

CRS Report for Congress

The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice

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Jennifer K. Elsea
Legislative Attorney
American Law Division



Prepared for Members and
Committees of Congress

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The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice

Summary

On November 13, 2001, President Bush issued a Military Order (M.O.) pertaining to the detention, treatment, and trial of certain non-citizens in the war against terrorism. Military commissions pursuant to the M.O. began in November 2004 against four persons declared eligible for trial, but proceedings were suspended after a federal district court found that one of the defendants could not be tried under the rules established by the Department of Defense (DOD). The D.C. Circuit Court of Appeals reversed that decision in *Rumsfeld v. Hamdan*, but the Supreme Court granted review and reversed the decision of the Court of Appeals. To permit military commissions to go forward, Congress approved the Military Commissions Act of 2006 (MCA), conferring authority to promulgate rules that depart from the strictures of the Uniform Code of Military Justice (UCMJ) and possibly U.S. international obligations. The Department of Defense published regulations to govern future military commissions pursuant to the MCA, but trials have not yet commenced.

This report provides a background and analysis comparing military commissions as envisioned under the MCA to the rules that had been established by the Department of Defense (DOD) for military commissions and to general military courts-martial conducted under the UCMJ. After reviewing the history of the implementation of military commissions in the “global war on terrorism,” the report provides an overview of the procedural safeguards to be implemented pursuant to the MCA. Finally, the report provides two tables comparing the MCA with regulations that had been issued by the Department of Defense pursuant to the President’s Military Order with standard procedures for general courts-martial under the Manual for Courts-Martial. The first table describes the composition and powers of the military tribunals, as well as their jurisdiction. The second chart, which compares procedural safeguards required by the MCA with those that had been incorporated in the DOD regulations and the established procedures in courts-martial, follows the same order and format used in CRS Report RL31262, *Selected Procedural Safeguards in Federal, Military, and International Courts*, to facilitate comparison with safeguards provided in federal court and international criminal tribunals.

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Introduction

Rasul v. Bush, issued by the U.S. Supreme Court at the end of its 2003-2004 term, clarified that U.S. courts do have jurisdiction to hear petitions for habeas corpus on behalf of the approximately 550 persons then detained at the U.S. Naval Station in Guantanamo Bay, Cuba, in connection with the war against terrorism,¹ establishing a role for federal courts to play in determining the validity of the military commissions convened pursuant to President Bush's Military Order (M.O.) of November 13, 2001.² After dozens of petitions for habeas corpus were filed in the federal District Court for the District of Columbia, Congress passed the Detainee Treatment Act of 2005 (DTA),³ revoking federal court jurisdiction over habeas claims, at least with respect to those not already pending, and creating jurisdiction in the Court of Appeals for the District of Columbia Circuit to hear appeals of final decisions of military commissions. The Supreme Court, in *Hamdan v. Rumsfeld*,⁴ overturned a decision by the D.C. Circuit that had upheld the military commissions, holding instead that although Congress has authorized the use of military commissions, such commissions must follow procedural rules as similar as possible to courts-martial proceedings, in compliance with the Uniform Code of Military Justice (UCMJ).⁵ In response, Congress passed the Military Commissions Act of 2006 (MCA) to authorize military commissions and establish procedural rules that are modeled after, but depart from in some significant ways, the UCMJ. The

¹ *Rasul v. Bush*, 542 U.S. 466 (2004). For a summary of *Rasul* and related cases, see CRS Report RS21884, *The Supreme Court and Detainees in the War on Terrorism: Summary and Analysis of Recent Decisions*, and CRS Report RS22466, *Hamdan v. Rumsfeld: Military Commissions in the “Global War on Terrorism,”* both by Jennifer K. Elsea.

² Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism §1(a), 66 Fed. Reg. 57,833 (Nov. 16, 2001) (hereinafter “M.O.”).

³ P.L. 109-148, §1005(e)(1).

⁴ *Hamdan v. Rumsfeld*, 548 U.S. __ (2006), *rev’g* 415 F.3d 33 (D.C. Cir. 2005).

⁵ 10 U.S.C. § 801 *et seq.*

Department of Defense has issued regulations for the conduct of military commissions pursuant to the MCA,⁶ but trials have not yet commenced.

Military Commissions: General Background

Military commissions are courts usually set up by military commanders in the field to try persons accused of certain offenses during war.⁷ Past military commissions trying enemy belligerents for war crimes directly applied the international law of war, without recourse to domestic criminal statutes, unless such statutes were declaratory of international law.⁸ Historically, military commissions have applied the same set of procedural rules that applied in courts-martial.⁹ By statute, military tribunals may be used to try “offenders or offenses designated by statute or the law of war.”¹⁰ Although the Supreme Court long ago stated that charges of violations of the law of war tried before military commissions need not be as exact as those brought before regular courts,¹¹ it is unclear whether the current Court would adopt that proposition or look more closely to precedent.

The President’s Military Order establishing military commissions to try suspected terrorists was the focus of intense debate both at home and abroad. Critics argued that the tribunals could violate any rights the accused may have under the

⁶ Department of Defense, The Manual for Military Commissions, January 18, 2007, available at [<http://www.defenselink.mil/pubs/pdfs/The%20Manual%20for%20Military%20Commissions.pdf>]

⁷ See CRS Report RL31191, *Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions* (providing a general background of U.S. history of military commissions), by Jennifer Elsea.

⁸ See U.S. Army Field Manual (FM) 27-10, The Law of Land Warfare, section 505(e) [hereinafter “FM 27-10”].

⁹ See WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 841-42 (2d ed. 1920)(noting that “in the absence of any statute or regulation,” the same principles and procedures commonly govern, though possibly more “liberally construed and applied”); David Glazier, Note, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005 (2003).

¹⁰ 10 U.S.C. § 821. There are only two statutory offenses for which convening a military commission is explicitly recognized: aiding the enemy and spying (in time of war). 10 U.S.C. §§ 904 and 906, respectively. The circumstances under which civilians accused of aiding the enemy may be tried by military tribunal have not been decided, but a court interpreting the article may limit its application to conduct committed in territory under martial law or military government, within a zone of military operations or area of invasion, or within areas subject to military jurisdiction. See FM 27-10, *supra* note 8, at para. 79(b)(noting that treason and espionage laws are available for incidents occurring outside of these areas, but are triable in civil courts). Spying is not technically a violation of the law of war, however, but violates domestic law and traditionally may be tried by military commission. See *id.* at para. 77 (explaining that spies are not punished as “violators of the law of war, but to render that method of obtaining information as dangerous, difficult, and ineffective as possible”).

¹¹ 327 U.S. at 17 (“Obviously charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment.”).

Constitution as well as their rights under international law, thereby undercutting the legitimacy of any verdicts rendered by the tribunals. The Administration established rules prescribing detailed procedural safeguards for the tribunals in Military Commission Order No. 1 (“M.C.O. No. 1”), issued in March 2002 and amended in 2005.¹² These rules were praised as a significant improvement over what might have been permitted under the language of the M.O., but some continued to argue that the enhancements did not go far enough and called for the checks and balances of a separate rule-making authority and an independent appellate process.¹³ Critics also noted that the rules did not address the issue of indefinite detention without charge, as appeared to be possible under the original M.O.,¹⁴ or that the Department of Defense may continue to detain persons who have been cleared by a military commission.¹⁵ The Pentagon has reportedly stated that its Inspector General (IG) looked into allegations, made by military lawyers assigned as prosecutors to the military commissions, that the proceedings are rigged to obtain convictions, but the IG did not substantiate the charges.¹⁶

President Bush determined that twenty of the detainees at the U.S. Naval Station in Guantánamo Bay were subject to the M.O., and 10 were subsequently charged for trial before military commissions.¹⁷

¹² Reprinted at 41 I.L.M. 725 (2002). A revision was issued Aug. 31, 2005. The Department of Defense (DOD) subsequently released ten “Military Commission Instructions” (“M.C.I. No. 1-10”) to elaborate on the set of procedural rules to govern military tribunals. The instructions set forth the elements of some crimes to be tried by military commission, established guidelines for civilian attorneys, and provided other administrative guidance and procedures for military commissions.

¹³ See Letter from Timothy H. Edgar, ACLU Legislative Counsel, *Military Commission Order No. 1, March 21, 2002* (April 16, 2002), available at [<http://www.aclu.org/NationalSecurity/NationalSecurity.cfm?ID=10150&c=111>] (last visited July 21, 2006); American College of Trial Lawyers, Report on Military Commissions for the Trial of Terrorists, March 2003 [hereinafter “ACTL”], available at [http://www.actl.com/AM/Template.cfm?Section>All_Publications&Template=/CM/ContentDisplay.cfm&ContentFileID=63] (last visited July 21, 2006); ACTL, Supplemental Report on Military Commissions for the Trial of Terrorists, Oct. 2005, online at [<http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=2152>] (last visited July 21, 2006).

¹⁴ The Administration has not explicitly used this authority; instead, it characterizes the prisoners as “enemy combatants” detained pursuant to the law of war. See, e.g., Response of the United States to Request for Precautionary Measures - Detainees in Guantanomo Bay, Cuba to the Inter-American Commission on Human Rights, Organization of American States 25 (2002)(“It is humanitarian law, and not human rights law, that governs the capture and detention of enemy combatants in an armed conflict.”)

¹⁵ See Bruce Zagaris, *U.S. Defense Department Issues Order on Military Commissions*, 18 No. 5 INT’L ENFORCEMENT L. REP 215 (2002) (citing comments by DOD chief counsel William J. Haynes II to a New York Times reporter).

¹⁶ See Neil A. Lewis, *Two Prosecutors Faulted Trials For Detainees*, NY TIMES, Aug. 1, 2005, at A1.

¹⁷ See Press Release, Department of Defense, President Determines Enemy Combatants Subject to His Military Order (July 3, 2003), available at [<http://www.defenselink.mil/>](continued...)

Hamdan v. Rumsfeld

Salim Ahmed Hamdan was captured in Afghanistan and charged with conspiracy for having allegedly worked for Osama Bin Laden.¹⁸ He challenged the lawfulness of the military commission under the UCMJ¹⁹ and claimed the right to be treated as a prisoner of war under the Geneva Conventions.²⁰ A ruling in his favor at the district court was reversed by the D.C. Circuit Court of Appeals, which, while rejecting the government's argument that the federal courts had no jurisdiction to interfere in ongoing commission proceedings, agreed with the government that the Geneva Conventions are not judicially enforceable;²¹ that even if they were, Hamdan was not entitled to their protections; and that in any event, the military commission would qualify as a "competent tribunal" for challenging the petitioner's non-POW status. The appellate court did not accept the government's argument that the President has inherent authority to create military commissions without any authorization from Congress, but found such authority in the Authorization to Use Military Force (AUMF),²² read together with UCMJ arts. 21 and 36.²³

The Supreme Court granted review and reversed. Before reaching the merits of the case, the Supreme Court dispensed with the government's argument that Congress had, by passing the Detainee Treatment Act of 2005 (DTA),²⁴ stripped the

¹⁷ (...continued)

releases/2003/nr20030703-0173.html] (last visited July 21, 2006). According to the Defense Department, that determination is effectively "a grant of [military] jurisdiction over the person." See John Mintz, *6 Could Be Facing Military Tribunals*, WASH. POST, July 4, 2003, at A1. In 2004, nine additional detainees were determined to be eligible. See Press Release, Department of Defense, Presidential Military Order Applied to Nine more Combatants (July 7, 2004), available at [http://www.defenselink.mil/releases/2004/nr20040707-0987.html] (last visited July 21, 2006). In November 2005, five more detainees were charged. See Press Release, Department of Defense, Military Commission Charges Approved (November 7, 2005), available at [http://www.defenselink.mil/releases/2005/nr20051107-5078.html] (last visited July 21, 2006).

¹⁸ 344 F.Supp.2d 152 (D. D.C. 2004), *rev'd* 415 F.3d 33 (D.C. Cir. 2005), *rev'd* 548 U.S. __ (2006). For a more thorough discussion of the *Hamdan* case, see CRS Report RS22466, *Hamdan v. Rumsfeld: Military Commissions in the 'Global War on Terrorism,'* by Jennifer K. Elsea.

¹⁹ 10 U.S.C. §§ 801 *et seq.*

²⁰ There are four Conventions, the most relevant of which is The Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3317 (hereinafter "GPW").

²¹ *Rumsfeld v. Hamdan*, 415 F.3d 33, 39-40 (D.C. Cir. July 15, 2005).

²² Authorization for Use of Military Force ("the AUMF"), P.L. 107-40, 115 Stat. 224 (2001).

²³ *Hamdan*, 415 F.3d at 37.

²⁴ P.L. 109-148, §1005(e)(1) provides that "no court ... shall have jurisdiction to hear or consider ... an application for ... habeas corpus filed by ... an alien detained ... at Guantanamo Bay." The provision was not yet law when the appellate court decided against the petitioner, *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd* 126 S.Ct. 2749 (continued...)

Court of its jurisdiction to review habeas corpus challenges by or on behalf of Guantanamo detainees whose petitions had already been filed.²⁵ In addition, regardless of whether the Geneva Conventions provide rights that are enforceable in Article III courts, the Court found that Congress, by incorporating the “law of war” into UCMJ art. 21,²⁶ brought the Geneva Conventions within the scope of law to be applied by courts.²⁷ Further, the Court found that, at the very least, Common Article 3 of the Geneva Conventions applies, even to members of al Qaeda, according to them a minimum baseline of protections, including protection from the “passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”²⁸

The Court concluded that, although Common Article 3 “obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict” and that “its requirements are general ones, crafted to accommodate a wide variety of legal systems,” the military commissions under M.C.O. No. 1 did not meet these criteria. In particular, the military commissions were not “regularly constituted” because they deviated too far, in the Court’s view, from the rules that apply to courts-

²⁴ (...continued)

(2006). At issue was whether this provision applies to pending cases. The Court found that the provision does not apply to Hamdan’s petition, but did not resolve whether it affects other cases that fall under the DTA’s provisions regarding final review of Combatant Status Review Tribunals. Slip op. at 19, and n.14. For an overview of issues related to the jurisdiction over *habeas corpus*, see CRS Report RL33180, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, by Jennifer K. Elsea and Kenneth Thomas.

²⁵ *Hamdan*, slip op. at 7. To resolve the question, the majority employed canons of statutory interpretation supplemented by legislative history, avoiding the question of whether the withdrawal of the Court’s jurisdiction would constitute a suspension of the Writ of Habeas Corpus, or whether it would amount to impermissible “court-stripping.” Justice Scalia, joined by Justices Alito and Thomas in his dissent, interpreted the DTA as a revocation of jurisdiction.

²⁶ 10 U.S.C. § 821 (“The provisions of [the UCMJ] conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.”). The *Hamdan* majority concluded that “compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted.” *Hamdan*, slip op. at 63.

²⁷ The Court disagreed that the Eisentrager case requires another result, noting that the Court there had decided the treaty question on the merits based on its interpretation of the Geneva Convention of 1929 and that the 1949 Conventions were drafted to reject that interpretation. *Hamdan*, slip op. at 63-65.

²⁸ GPW art. 3 § 1(d). The identical provision is included in each of the four Geneva Conventions and applies to any “conflict not of an international character.” The majority declined to accept the President’s interpretation of Common Article 3 as inapplicable to the conflict with al Qaeda and interpreted the phrase “in contradistinction to a conflict between nations,” which the Geneva Conventions designate a “conflict of international character.” *Hamdan*, slip op. at 67.

martial, without a satisfactory explanation of the need for such deviation.²⁹ Justice Scalia, joined by Justices Thomas and Alito, dissented, arguing that the DTA should be interpreted to preclude the Court's review.

The Military Commissions Act of 2006

In response to the *Hamdan* decision, Congress enacted the Military Commissions Act of 2006 (“MCA”) to grant the President express authority to convene military commissions to prosecute those fitting the definition under the MCA of “alien unlawful enemy combatants.” The MCA eliminates the requirement for military commissions to conform to either of the two uniformity requirements in article 36, UCMJ. Instead, it establishes a new chapter 47a in title 10, U.S. Code and excepts military commissions under the new chapter from the requirements in article 36.³⁰ It provides that the UCMJ “does not, by its terms, apply to trial by military commissions except as specifically provided in this chapter.” While declaring that the new chapter is “based upon the procedures for trial by general courts-martial under [the UCMJ],” it establishes that “[t]he judicial construction and application of [the UCMJ] are not binding on military commissions established under this chapter.”³¹ It expressly exempts the new military commission from UCMJ articles 10 (speedy trial), 31 (self-incrimination warnings) and 32 (pretrial investigations), and amends articles 21, 28, 48, 50(a), 104, and 106 of the UCMJ to except military commissions under the new chapter.³² Other provisions of the UCMJ are to apply to trial by military commissions under the new chapter only to the extent provided therein.³³

Jurisdiction

The President’s M.O. was initially criticized by some as overly broad in its assertion of jurisdiction, because it could be interpreted to cover non-citizens who had no connection with Al Qaeda or the terrorist attacks of September 11, 2001, as well as offenders or offenses not triable by military commission pursuant to statute

²⁹ *Id.* at 70 (plurality opinion); *Id.* (Kennedy, J., concurring) at 10. Justice Stevens, joined by Justices Ginsburg, Breyer, and Souter, further based their conclusion on the basis that M.C.O. No. 1 did not meet all criteria of art. 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977 (Protocol I). While the United States is not party to Protocol I, the plurality noted that many authorities regard it as customary international law.

³⁰ MCA § 4 (adding to 10 U.S.C. § 836(a) the words “except as provided in chapter 47A of this title” and to § 836(b) the words “except insofar as applicable to military commissions established under chapter 47A of this title”).

³¹ 10 U.S.C. § 948a (as added by the MCA).

³² MCA § 4 (amending 10 U.S.C. §§ 821(jurisdiction of general courts-martial not exclusive), 828 (detail or employment of reporters and interpreters), 848 (power to punish contempt), 850(a) (admissibility of records of courts of inquiry), 904(aiding the enemy), and 906(spying)).

³³ 10 U.S.C. § 948b(d)(2).

or the law of war.³⁴ A person subject to the M.O. was amenable to detention and possible trial by military tribunal for violations of the law of war and “other applicable law.”³⁵ M.C.O. No. 1 established that commissions may be convened to try aliens designated by the President as subject to the M.O., whether captured overseas or on U.S. territory, for violations of the law of war and “all other offenses triable by military commissions.” The MCA largely validates the President’s jurisdictional scheme for military commissions.

Personal Jurisdiction. While many observers agreed that the President is authorized by statute to convene military commissions in the “Global War on Terrorism,” some believed the President’s constitutional and statutory authority to establish such tribunals does not extend beyond Congress’ authorization to use armed force in response to the attacks.³⁶ Under a literal interpretation of the M.O., however, the President could designate as subject to the order any non-citizen he believes has ever engaged in any activity related to international terrorism, no matter when or where these acts took place.

The M.O. was not cited for the authority to detain; instead, the Department of Defense asserted its authority to be grounded in the law of war, which permits belligerents to kill or capture and detain enemy combatants. The Department of Defense defined “enemy combatant” to mean “an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners,” including “any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.”³⁷

The MCA applies a somewhat broader definition for “unlawful enemy combatant,” which includes:

- (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or

³⁴ For a discussion of criticism related to the M.O. and M.C.O. No. 1, see CRS Report RL31600, *The Department of Defense Rules for Military Commissions: Analysis of Procedural Rules and Comparison with Proposed Legislation and the Uniform Code of Military Justice*, by Jennifer K. Elsea; see NATIONAL INSTITUTE OF MILITARY JUSTICE, ANNOTATED GUIDE: PROCEDURES FOR TRIALS BY MILITARY COMMISSIONS OF CERTAIN NON-UNITED STATES CITIZENS IN THE WAR AGAINST TERRORISM 10-11(2004)(hereinafter “NIMJ”).

³⁵ M.O. § 1(e) (finding such tribunals necessary to protect the United States and for effective conduct of military operations).

³⁶ P.L. 107-40, 115 Stat. 224 (2001) (authorizing military force against those who “planned, authorized, committed, [or] aided” the Sept. 11 attacks or who “harbored such ... persons”).

³⁷ See Combatant Status Review Tribunal Procedure, available online at [<http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf>] (last visited Oct. 1, 2006).

(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.³⁸

Thus, persons who do not directly participate in hostilities, but “purposefully and materially” support hostilities, are subject to treatment as an “unlawful enemy combatant” under the MCA. Citizens who fit the definition of “unlawful enemy combatant” are not amenable to trial by military commission under the MCA, but may be subject to detention.

The MCA does not define “hostilities” or explain what conduct amounts to “supporting hostilities.” To the extent that the jurisdiction is interpreted to include conduct that falls outside the accepted definition of participation in an armed conflict, the MCA might run afoul of the courts’ historical aversion to trying civilians before military tribunal when other courts are available.³⁹ It is unclear whether this principle would apply to aliens captured and detained overseas, but the MCA does not appear to exempt from military jurisdiction permanent resident aliens captured in the United States who might otherwise meet the definition of “unlawful enemy combatant.” It is generally accepted that aliens within the United States are entitled to the same protections in criminal trials that apply to U.S. citizens. Therefore, to subject persons to trial by military commission who do not meet the exception carved out by the Supreme Court in *ex parte Quirin*⁴⁰ for unlawful belligerents, to the extent such persons enjoy constitutional protections, would likely raise significant constitutional questions.

Subject-Matter Jurisdiction. The MCA provides jurisdiction to military commissions over “any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant....”⁴¹ Crimes to be triable by military commission are defined in subchapter VII (10 U.S.C. §§ 950p - 950w). Offenses include the following: murder of protected persons; attacking civilians, civilian objects, or protected property; pillaging; denying quarter; taking hostages; employing poison or similar weapons; using protected persons or property as shields; torture, cruel or inhuman treatment; intentionally causing serious bodily injury; mutilating or maiming; murder in violation of the law of war; destruction of property in violation of the law of war; using treachery or perfidy; improperly using a flag of truce or distinctive emblem; intentionally mistreating a dead body; rape; sexual assault or abuse; hijacking or hazarding a vessel or aircraft; terrorism; providing material support for terrorism; wrongfully aiding the enemy; spying; contempt; perjury and obstruction of justice. 10 U.S.C. § 950v. Conspiracy (§ 950v(b)(28)),

³⁸ 10 U.S.C. § 948a(1).

³⁹ See, e.g., *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), *Duncan v. Kahanamoku*, 327 U.S. 304 (1945).

⁴⁰ 317 U.S. 1 (1942).

⁴¹ 10 U.S.C. § 948d.

attempts (§ 950t), and solicitation (§ 950u) to commit the defined acts are also punishable.

Military commissions under M.C.O. No. 1 were to have jurisdiction over crimes listed in M.C.I. No. 2, Crimes and Elements for Trials by Military Commission,⁴² which appears to have served as a basis for the MCA list. The list of crimes in M.C.I. No. 2 was not meant to be exhaustive. Rather, it was intended as an illustration of acts punishable under the law of war⁴³ or triable by military commissions,⁴⁴ but did not permit trial for *ex post facto* crimes.⁴⁵

Although many of the crimes defined in the MCA seem to be well-established offenses against the law of war, at least in the context of an international armed conflict,⁴⁶ a court might conclude that some of the listed crimes are new. For

⁴² M.C.I. No. 2 was published in draft form by DOD for outside comment. The final version appears to have incorporated some of the revisions, though not all, suggested by those who offered comments. *See NATIONAL INSTITUTE OF MILITARY JUSTICE, MILITARY COMMISSION INSTRUCTIONS SOURCEBOOK 95 (2003)* [hereinafter “SOURCEBOOK”].

⁴³ Crimes against the law of war listed in M.C.I. No. 2 are: 1) Willful Killing of Protected Persons; 2) Attacking Civilians; 3) Attacking Civilian Objects; 4) Attacking Protected Property; 5) Pillaging; 6) Denying Quarter; 7) Taking Hostages; 8) Employing Poison or Analogous Weapons; 9) Using Protected Persons as Shields; 10) Using Protected Property as Shields; 11) Torture; 12) Causing Serious Injury; 13) Mutilation or Maiming; 14) Use of Treachery or Perfidy; 15) Improper Use of Flag of Truce; 16) Improper Use of Protective Emblems; 17) Degrading Treatment of a Dead Body; and 18) Rape.

⁴⁴ Crimes “triable by military commissions” include 1) Hijacking or Hazarding a Vessel or Aircraft; 2) Terrorism; 3) Murder by an Unprivileged Belligerent; 4) Destruction of Property by an Unprivileged Belligerent; 5) Aiding the Enemy; 6) Spying; 7) Perjury or False Testimony; and 8) Obstruction of Justice Related to Military Commissions. Listed as “other forms of liability and related offenses” are: 1) Aiding or Abetting; 2) Solicitation; 3) Command/Superior Responsibility - Perpetrating; 4) Command/Superior Responsibility - Misprision; 5) Accessory After the Fact; 6) Conspiracy; and 7) Attempt.

⁴⁵ *See M.C.I. No. 2 § 3(A)* (“No offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question.”).

⁴⁶ For example, see Article 3 of the Statute governing the International Criminal Tribunal for the former Yugoslavia (ICTY) includes the following as violations of the laws or customs of war in non-international armed conflict.

Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.

(continued...)

example, a plurality of the Supreme Court in *Hamdan* agreed that conspiracy is not a war crime under the traditional law of war.⁴⁷ The crime of “murder in violation of the law of war,” which punishes persons who, as unprivileged belligerents, commit hostile acts that result in the death of any persons, including lawful combatants, may also be new. While it appears to be well-established that a civilian who kills a lawful combatant is triable for murder and cannot invoke the defense of combatant immunity, it is not clear that the same principle applies in armed conflicts of a non-international nature, where combatant immunity does not apply. The International Criminal Tribunal for the former Yugoslavia (ICTY) has found that war crimes in the context of non-international armed conflict include murder of civilians, but have implied that the killing of a combatant is not a war crime.⁴⁸ Similarly, defining as a war crime the “material support for terrorism”⁴⁹ does not appear to be supported by historical precedent.

⁴⁶ (...continued)

UN Doc. S/Res/827 (1993), art. 3. The ICTY Statute and procedural rules are available at [<http://www.un.org/icty/legaldoc-e/index.htm>]. The Trial Chamber in the case Prosecutor v. Naletilic and Martinovic, (IT-98-34) March 31, 2003, interpreted Article 3 of the Statute to cover specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as grave breaches by those Conventions; (iii) violations of [Common Article 3] and other customary rules on internal conflicts, and (iv) violations of agreements binding upon the parties to the conflict” *Id.* at para. 224. *See also* Prosecutor v. Tadic, (IT-94-1) (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 86-89.

The Appeals Chamber there set forth factors that make an offense a “serious” violation necessary to bring it within the ICTY’s jurisdiction:

- (i) the violation must constitute an infringement of a rule of international humanitarian law;
- (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met ...;
- (iii) the violation must be “serious”, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim....
- (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

Id. at para. 94

⁴⁷ *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2785 (2006).

⁴⁸ Prosecutor v. Kvocka *et al.*, Case No. IT-98-30/1 (Trial Chamber), November 2, 2001, para. 124: (“An additional requirement for Common Article 3 crimes under Article 3 of the Statute is that the violations must be committed against persons ‘taking no active part in the hostilities.’”); Prosecutor v. Jelisic, Case No. IT-95-10 (Trial Chamber), December 14, 1999, para. 34 (“Common Article 3 protects “[p]ersons taking no active part in the hostilities” including persons “placed *hors de combat* by sickness, wounds, detention, or any other cause.”); Prosecutor v. Blaskic, Case No. IT-95-14 (Trial Chamber), March 3, 2000, para. 180 (“Civilians within the meaning of Article 3 are persons who are not, or no longer, members of the armed forces. Civilian property covers any property that could not be legitimately considered a military objective.”).

⁴⁹ 10 U.S.C. § 950v(b)(25)(incorporating the definition found in 18 U.S.C. § 2339(A)).

Temporal and Spatial Jurisdiction. The law of war has traditionally applied within the territorial and temporal boundaries of an armed conflict between at least two belligerents.⁵⁰ It traditionally has not been applied to conduct occurring on the territory of neutral states or on territory not under the control of a belligerent, to conduct that preceded the outbreak of hostilities, or to conduct during hostilities that do not amount to an armed conflict. Unlike the conflict in Afghanistan, the “Global War on Terrorism” does not have clear boundaries in time or space,⁵¹ nor is it entirely clear who the belligerents are.

The broad reach of the M.O. to encompass conduct and persons customarily subject to ordinary criminal law evoked criticism that the claimed jurisdiction of the military commissions exceeded the customary law of armed conflict, which M.C.I. No. 2 purported to restate.⁵² The MCA provides jurisdiction to military commissions over covered offenses “when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.”⁵³ However, certain definitions used in describing the offenses triable by military commissions would seem to limit many of them to conduct occurring in an armed conflict.

A common element among the crimes enumerated in M.C.I. No.2 was that the conduct “took place in the context of and was associated with armed conflict.” The instruction explained that the phrase required a “nexus between the conduct and armed hostilities,”⁵⁴ which has traditionally been a necessary element of any war crime. However, the definition of “armed hostilities” was broader than the customary definition of war or “armed conflict.” According to the M.C.I., “armed hostilities” need not be a declared war or “ongoing mutual hostilities.”⁵⁵ Instead, any hostile act or attempted hostile act might have had sufficient nexus if its severity rose

⁵⁰ See WINTHROP, *supra* note 9, at 773 (the law of war “prescribes the rights and obligations of belligerents, or ... define[s] the status and relations not only of enemies — whether or not in arms — but also of persons under military government or martial law and persons simply resident or being upon the theatre of war, and which authorizes their trial and punishment when offenders”); *id* at 836 (military commissions have valid jurisdiction only in theater of war or territory under martial law or military government).

⁵¹ Some may argue that no war has a specific deadline and that all conflicts are in a sense indefinite. In traditional armed conflicts, however, it has been relatively easy to identify when hostilities have ended; for example, upon the surrender or annihilation of one party, an annexation of territory under dispute, an armistice or peace treaty, or when one party to the conflict unilaterally withdraws its forces. See GERHARD VON GLAHN, LAW AMONG NATIONS 722-730 (6th ed. 1992).

⁵² See Human Rights First, Trial Under Military Order, A Guide to the Final Rules for Military Commissions (revised May 2006)[hereinafter “HRF”], available at [http://www.humanrightsfirst.org/us_law/PDF/detainees/trials_under_order0604.pdf] (last visited July 21, 2006); See Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 WASH. U. GLOBAL STUD. L. REV. 135, 146 (2004) (noting possibly advantageous domestic aspects of treating terrorist attacks as war crimes, but identifying possible pitfalls of creating a new international legal regime).

⁵³ 10 U.S.C. § 948d.

⁵⁴ M.C.I. No. 2 § 5(C).

⁵⁵ *Id.*

to the level of an “armed attack,” or if it were intended to contribute to such acts. Some commentators have argued that the expansion of “armed conflict” beyond its customary bounds improperly expanded the jurisdiction of military commissions beyond those that by statute or under the law of war are triable by military commissions.⁵⁶ The Supreme Court has not clarified the scope of the “Global War on Terrorism” but has not simply deferred to the President’s interpretation.

In enacting the MCA, Congress seems to have provided the necessary statutory definitions of criminal offenses to overcome previous objections with respect to subject matter jurisdiction of military commissions. However, questions may still arise with respect to the necessity for conduct to occur in the context of an armed conflict in order to be triable by military commission. There is no express requirement to that effect in the MCA. The overall purpose of the statute together with the elements of some of the crimes arguably may be read to require a nexus.

The definition for “Enemy” provided in M.C.I. No. 2 raised similar issues. According to § 5(B), “Enemy” includes

any entity with which the United States or allied forces may be engaged in armed conflicts or which is preparing to attack the United States. It is not limited to foreign nations, or foreign military organizations or members thereof. “Enemy” specifically includes any organization of terrorists with international reach.

Some observers argued that this impermissibly subjected suspected international criminals to the jurisdiction of military commissions in circumstances in which the law of armed conflict has not traditionally applied.⁵⁷ The distinction between a “war crime,” traditionally subject to the jurisdiction of military commissions, and a common crime, traditionally the province of criminal courts, may prove to be a matter of some contention during some of the proceedings.⁵⁸ The MCA does not define “enemy.” Military commissions trying persons accused of spying or aiding the enemy, for example, face the challenge of determining whether the conduct assisted an “enemy of the United States” as required under the MCA.

Composition and Powers

M.C.O. No. 1 provided for military commissions to consist of panels of three to seven military officers as well as one or more alternate members who had been “determined to be competent to perform the duties involved” by the Secretary of

⁵⁶ See SOURCEBOOK, *supra* note 42, at 38-39 (NACDL comments); *id.* at 51 (Human Rights Watch (HRW) comments); *id.* at 59-60 (LCHR). However, M.C.I. No. 9 lists among possible “material errors of law” for which the Reviewing Panel might return a finding for further procedures, “a conviction of a charge that fails to state an offense that by statute or the law of war may be tried by military commission....” M.C.I. No. 9 § 4(C)(2)(b).

⁵⁷ See *id.* at 38 (NACDL comments).

⁵⁸ See *id.* at 98 (commentary of Eugene R. Fidell and Michael F. Noone).

Defense or his designee,⁵⁹ and could include reserve personnel on active duty, National Guard personnel in active federal service, and retired personnel recalled to active duty. The rules also permitted the appointment of persons temporarily commissioned by the President to serve as officers in the armed services during a national emergency.⁶⁰ The presiding officer was required to be a judge advocate in any of the U.S. armed forces, but not necessarily a military judge.⁶¹

The MCA provides for a qualified military judge to preside over panels of at least five military officers, except in the cases in which the death penalty is sought, in which case the minimum number of panel members is twelve.⁶² Procedures for assigning military judges as well as the particulars regarding the duties they are to perform are left to the Secretary of Defense to prescribe, except that the military judge may not be permitted to consult with members of the panel outside of the presence of the accused and counsel except as prescribed in 10 U.S.C. § 949d. The military judge has the authority to decide matters related to the admissibility of evidence, including the treatment of classified information, but has no authority to compel the government to produce classified information.

Like the previous DOD rules,⁶³ the MCA empowers military commissions to maintain decorum during proceedings. M.C.O. No. 1 authorized the presiding officer “to act upon any contempt or breach of Commission rules and procedures,” including disciplining any individual who violates any “laws, rules, regulations, or other orders” applicable to the commission, as the presiding officer saw fit. Presumably this power was to include not only military and civilian attorneys but also any witnesses who had been summoned under order of the Secretary of Defense pursuant to M.C.O. No. 1 § 5(A)(5).⁶⁴ The MCA, 10 U.S.C. § 950w authorizes the military commissions to “punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder.” It is unclear whether this section is meant to expand the jurisdiction of military commissions to cover non-enemy combatant witnesses or civilian observers. The UCMJ authorizes other military commissions to punish contempt with a fine of \$100,

⁵⁹ M.C.O. No. 1 § 4(A)(3).

⁶⁰ See 10 U.S.C. § 603, listed as reference (e) of M.C.O. No. 1.

⁶¹ M.C.O. No. 1 § 4(A)(4). See NIMJ, *supra* note 34, at 17 (commenting that the lack of a military judge to preside over the proceedings is a significant departure from the UCMJ). A judge advocate is a military officer of the Judge Advocate General’s Corps of the Army or Navy (a military lawyer). A military judge is a judge advocate who is certified as qualified by the JAG Corps of his or her service to serve in a role similar to civilian judges.

⁶² 10 U.S.C. §§ 948m and 949m.

⁶³ Throughout this report, except when otherwise specified, “DOD rules” refers to M.C.O. No. 1 and other orders and instructions pursuant to the President’s Military Order, and does not refer to the new Manual for Military Commissions published by DOD on January 18, 2007.

⁶⁴ See M.C.O. No. 1 § 3(C) (asserting jurisdiction over participants in commission proceedings “as necessary to preserve the integrity and order of the proceedings”).

confinement for up to 30 days, or both.⁶⁵ Under article 47 of the UCMJ, a duly subpoenaed witness who is not subject to the UCMJ and who refuses to appear before a military commission may be prosecuted in federal court.⁶⁶ This article is not expressly made inapplicable to the military commissions established under the MCA. The military commission has the same power as a general court-martial to compel witnesses to appear in a manner “similar to that which courts of the United States having criminal jurisdiction may lawfully issue.”⁶⁷ However, rather than providing that the trial counsel and the defense are to have equal opportunity to compel witnesses and obtain evidence, the MCA provides the defense a “reasonable opportunity” to obtain witnesses and evidence.

One of the perceived shortcomings of the M.O. had to do with the problem of command influence over commission personnel. M.C.O. No. 1 provided for a “full and fair trial,” but contained few specific safeguards to address the issue of impartiality. The President or his designee were empowered to decide which charges to press; to select the members of the panel, the prosecution and the defense counsel, and the members of the review panel; and to approve and implement the final outcome. The President or his designees had the authority to write procedural rules, interpret them, enforce them, and amend them. Justice Kennedy remarked in his concurring opinion that the concentration of authority in the Appointing Authority was a significant departure from the structural safeguards Congress has built into the military justice system.⁶⁸

The MCA, by providing requirements for the procedural rules to guard against command influence, may alleviate these concerns. In particular, the MCA prohibits the unlawful influence of military commissions and provides that neither the military commission members nor military counsel may have adverse actions taken against them in performance reviews. Many of the procedural rules are left to the discretion of the Secretary of Defense or his designee, more so than is the case under the UCMJ.

Procedures Accorded the Accused

M.C.O. No. 1 contained procedural safeguards similar to many of those that apply in general courts-martial, but did not specifically adopt any procedures from the UCMJ, even those that explicitly apply to military commissions.⁶⁹ The M.C.O.

⁶⁵ See 10 U.S.C. § 848. This section is made inapplicable to military commissions in chapter 47a by MCA § 4.

⁶⁶ See 10 U.S.C. § 847. It is unclear how witnesses are “duly subpoenaed;” 10 U.S.C. § 846 empowers the president of the court-martial to compel witnesses to appear and testify and to compel production of evidence, but this statutory authority does not explicitly apply to military commissions. The subpoena power extends to “any part of the United States, or the Territories, Commonwealth and possessions.”

⁶⁷ 10 U.S.C. § 950j.

⁶⁸ *Hamdan*, slip op. at 11-16 (Kennedy, J. concurring).

⁶⁹ See 10 U.S.C. § 836 (providing military commission rules “may not be contrary to or inconsistent with [the UCMJ]”). But see *In re Yamashita*, 327 U.S. 1, 19-20 (1946)(finding (continued...)

made clear that its rules alone and *no others* were to govern the trials,⁷⁰ perhaps precluding commissions from looking to the UCMJ or other law to fill in any gaps. Without explicitly recognizing that accused persons had rights under the law, the M.C.O. listed procedures to be accorded to the accused, but specified that these were not to be interpreted to give rise to any enforceable right, benefit or privilege, and were not to be construed as requirements of the U.S. Constitution.⁷¹ Prior to the DTA, the accused had no established opportunity to challenge the interpretation of the rules or seek redress in case of a breach.⁷²

The MCA lists a minimum set of rights to be afforded the accused in any trial, and provides the accused an opportunity to appeal adverse verdicts based on “whether the final decision was consistent with the standards and procedures specified” in the MCA, and “to the extent applicable, the Constitution and the laws of the United States.” The Department of Defense rules provided the accused was to be informed of the charges sufficiently in advance of trial to prepare a defense;⁷³ the MCA provides that the accused is to be informed of the charges as soon as practicable after the charges and specifications are referred for trial.⁷⁴ The accused continues under the MCA to be presumed innocent until determined to be guilty. As was the case with the DOD rules, the presumption of innocence and the right against self-incrimination are to result in an entered plea of “Not Guilty” if the accused refuses to enter a plea or enters a “Guilty” plea that is determined to be involuntary or ill informed.⁷⁵ The accused has the right not to testify at trial and to have the opportunity to present evidence and cross-examine witnesses for the prosecution,⁷⁶ as was the case under the DOD rules.⁷⁷

Open Hearing. The M.C.O. rules provided that the trials themselves were to be conducted openly except to the extent the Appointing Authority or presiding

⁶⁹ (...continued)

Congress did not intend the language “military commission” in Article 38 of the Articles of War, the precursor to UCMJ Art. 36, to mean military commissions trying enemy combatants). President Bush explicitly invoked UCMJ art. 36 as statutory authority for the M.O., and included a finding, “consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.” M.O. § 1(g). The Supreme Court, however, rejected that finding as unsupported by the record and read the “uniformity” clause of UCMJ art. 36 as requiring that military commissions must follow rules as close as possible to those that apply in courts-martial.

⁷⁰ M.C.O. No. 1 § 1.

⁷¹ *Id.* § 10.

⁷² *Id.*; M.C.I. No. 1 § 6 (Non-Creation of Right).

⁷³ M.C.O. No. 1 § 5(A).

⁷⁴ 10 U.S.C. § 948q.

⁷⁵ M.C.O. No. 1 §§ 5(B) and 6(B); 10 U.S.C. § 949i.

⁷⁶ 10 U.S.C. § 949a(b).

⁷⁷ *Id.* §§ 4(A)(5)(a); 5(K); 6B(3).

officer closed proceedings to protect classified or classifiable information or information protected by law from unauthorized disclosure, the physical safety of participants, intelligence or law enforcement sources and methods, other national security interests, or “for any other reason necessary for the conduct of a full and fair trial.”⁷⁸ However, at the discretion of the Appointing Authority, “open proceedings” did not necessarily have to be open to the public and the press.⁷⁹

Because the public, and not just the accused, has a constitutionally protected interest in public trials, the extent to which trials by military commission are open to the press and public may be subject to challenge by media representatives.⁸⁰ The First Amendment right of public access extends to trials by court-martial,⁸¹ but is not absolute. Trials may be closed only where the following test is met: the party seeking closure demonstrates an overriding interest that is likely to be prejudiced; the closure is narrowly tailored to protect that interest; the trial court has considered reasonable alternatives to closure; and the trial court makes adequate findings to support the closure.⁸²

The MCA provides that the military judge may close portions of a trial only to protect information from disclosure where such disclosure could reasonably be expected to cause damage to the national security, such as information about intelligence or law enforcement sources, methods, or activities; or to ensure the physical safety of individuals.⁸³ The information to be protected from disclosure does not necessarily have to be classified. To the extent that the exclusion of the press and public is based on the discretion of the military judge without consideration of the constitutional requirements relative to the specific exigencies of the case at trial, the procedures may implicate the First Amendment rights of the press and public.

Although the First Amendment bars government interference with the free press, it does not impose on the government a duty “to accord the press special access to information not shared by members of the public generally.”⁸⁴ The reporters’ right to gather information does not include an absolute right to gain access to areas not

⁷⁸ M.C.O. No. 1 § 6(D)(5).

⁷⁹ M.C.O. No. 1 at § 6(B)(3) (“Open proceedings may include, at the discretion of the Appointing Authority, attendance by the public and accredited press, and public release of transcripts at the appropriate time.”). In courts-martial, “public” is defined to include members of the military as well as civilian communities. Rules for Court-Martial (R.C.M.) Rule 806.

⁸⁰ See *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 602 (1982) (newspaper had standing to challenge court order closing portions of criminal trial).

⁸¹ *United States v. Hershey*, 20 M.J. 433 (C.M.A.1985), *cert. denied*, 474 U.S. 1062 (1986); *United States v. Grunden*, 2 M.J. 116 (C.M.A.1977). The press has standing to challenge closure of military justice proceedings. *ABC, Inc. v. Powell*, 47 M.J. 363, 365 (1997).

⁸² See *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984).

⁸³ 10 U.S.C. § 949d(d).

⁸⁴ *Pell v. Procunier*, 417 U.S. 817, 822-24 (1974).

open to the public.⁸⁵ Access of the press to the proceedings of military commissions may be an issue for the courts ultimately to decide, even if those tried by military commission are determined to lack the protection of the Sixth Amendment right to an open trial or means to challenge the trial.⁸⁶

Right to be Present. Under UCMJ art. 39,⁸⁷ the accused at a court-martial has the right to be present at all proceedings other than the deliberation of the members. Under the DOD rules for military commissions under M.C.O. No. 1, the accused or the accused's civilian attorney could be precluded from attending portions of the trial for security reasons, but a detailed defense counsel was to be present for all hearings. The MCA does not provide for the exclusion of the accused from portions of his trial, and does not allow classified information to be presented to panel members that is not disclosed to the accused. The accused may be excluded from trial proceedings (other than panel deliberations) by the military judge only upon a determination that the accused persists in disruptive or dangerous conduct.⁸⁸

Right to Counsel. As is the case in military courts-martial, an accused before a military commission under both M.C.O. No. 1 and the MCA has the right to have military counsel assigned free of charge. The right to counsel attaches much earlier in the military justice system, where the accused has a right to request an attorney prior to being interrogated about conduct relating to the charges contemplated. Under the MCA, at least one qualifying military defense counsel is to be detailed "as soon as practicable after the swearing of charges...."⁸⁹ The accused may also hire a civilian attorney who is a U.S. citizen, is admitted to the bar in any state, district, or possession, has never been disciplined, has a SECRET clearance (or higher, if necessary for a particular case), and agrees to comply with all applicable rules. If civilian counsel is hired, the detailed military counsel serves as associate counsel.⁹⁰ Unlike the DOD rules, the MCA provides that the accused has the right to self-representation.⁹¹

⁸⁵ See Juan R. Torruella, *On the Slippery Slopes of Afghanistan: Military Commissions and the Exercise of Presidential Power*, 4 U. PA. J. CONST. L. 648, 718 (2002) (noting that proceedings, if held at the Guantánamo Bay Naval Station, may be *de facto* closed due to the physical isolation of the facility).

⁸⁶ Cf. Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir.2002), (finding closure of immigration hearings based on relation to events of Sept. 11 unconstitutional infringement on the First Amendment right to free press). But see North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002) cert denied 538 U.S. 1056 (2003)(no presumption of openness for immigration hearings).

⁸⁷ 10 U.S.C. § 839.

⁸⁸ 10 U.S.C. § 949d(e).

⁸⁹ 10 U.S.C. § 948k.

⁹⁰ 10 U.S.C. § 949c(b).

⁹¹ 10 U.S.C. § 949a(b)(2)(D). M.C.I. No. 4 required detailed defense counsel to "defend the accused zealously within the bounds of the law ... notwithstanding any intention expressed by the accused to represent himself." M.C.I. No. 4 § 3(C).

DOD rules provided that defense counsel was to be assigned free of cost once charges were referred, but permitted the accused to request another JAG officer to be assigned as a replacement if available in accordance with any applicable instructions or supplementary regulations that might later be issued.⁹² The MCA does not provide the accused an opportunity to request a specific JAG officer to act as counsel. If the accused retains the services of a civilian attorney, or, presumably, if the accused opts to represent himself, military defense counsel is to act as associate counsel.

The MCA requires civilian attorneys defending an accused before military commission to meet the same strict qualifications that applied under DOD rules.⁹³ Under M.C.O. No. 1, a civilian attorney had to be a U.S. citizen with at least a SECRET clearance,⁹⁴ with membership in any state or territorial bar and no disciplinary record, and was required to agree in writing to comply with all rules of court.⁹⁵ The MCA does not set forth in any detail what rules might be established to govern the conduct of civilian counsel. The MCA does not address the monitoring of communications between the accused and his attorney, and does not provide for an attorney-client privilege. Such matters will likely be subject to rules established by the Department of Defense.

With respect to the monitoring of attorney-client communications, the DOD rules for military commissions initially provided that civilian counsel were required to agree that communications with the client were subject to monitoring. That requirement was later modified to require prior notification and to permit the attorney to notify the client when monitoring is to occur.⁹⁶ Although the government was not permitted to use information against the accused at trial, some argued that the absence of the normal attorney-client privilege could impede communications between them, possibly decreasing the effectiveness of counsel. Civilian attorneys were bound to inform the military counsel upon learning of information about a

⁹² M.C.O. No. 1 § 4(C). M.C.I. No. 4 § 3(D) listed criteria for the “availability” of selected detailed counsel.

⁹³ 10 U.S.C. § 949c(b).

⁹⁴ Originally, civilian attorneys were required to pay the costs associated with obtaining a clearance. M.C.I. No. 5 §3(A)(2)(d)(ii). DOD later waived the administrative costs for processing applications for TOP SECRET clearances in cases that would require the higher level of security clearance. See DOD Press Release No. 084-04 , New Military Commission Orders, Annex Issued (Feb. 6, 2004), *available at* [<http://www.defenselink.mil/releases/2004/nr20040206-0331.html>] (Last visited July 24, 2006).

⁹⁵ M.C.O. No. 1 § 4(C)(3)(b).

⁹⁶ See M.C.O. No. 3, “Special Administrative Measures for Certain Communications Subject to Monitoring.” The required affidavit and agreement annexed to M.C.I. No. 3 was modified to eliminate the following language:

I understand that my communications with my client, even if traditionally covered by the attorney-client privilege, may be subject to monitoring or review by government officials, using any available means, for security and intelligence purposes. I understand that any such monitoring will only take place in limited circumstances when approved by proper authority, and that any evidence or information derived from such communications will not be used in proceedings against the Accused who made or received the relevant communication.

pending crime that could lead to “death, substantial bodily harm, or a significant impairment of national security.”⁹⁷ The Appointing Authority was empowered to revoke any attorney’s eligibility to appear before any commission.⁹⁸

Evidentiary Matters

The Sixth Amendment to the U.S. Constitution guarantees that those accused in criminal prosecutions have the right to be “confronted with the witnesses against [them]” and to have “compulsory process for obtaining witnesses in [their] favor.”⁹⁹ The Supreme Court has held that “[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.”¹⁰⁰ The Military Rules of Evidence (Mil. R. Evid.)¹⁰¹ provide that “[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States [and other applicable statutes, regulations and rules].”¹⁰² Relevant evidence is excluded if its probative value is outweighed by other factors.¹⁰³ At court-martial, the accused has the right to view any documents in the possession of the prosecution related to the charges, and evidence that reasonably tends to negate the guilt of the accused, reduce the degree of guilt or reduce the punishment,¹⁰⁴ with some allowance for protecting non-relevant classified information.¹⁰⁵

Supporters of the use of military commissions to try suspected terrorists have viewed the possibility of employing evidentiary standards that vary from those that as a significant advantage over the use of standards that apply in federal courts or in military courts-martial. The Supreme Court seemed to indicate that the DOD rules were inadequate under international law, remarking that “various provisions of Commission Order No. 1 dispense with the principles, articulated in Article 75 [of Protocol I to the Geneva Conventions] and indisputably part of the customary

⁹⁷ M.C.I. No. 5, Annex B § II(J). M.C.I. No. 5 provided no criteria to assist defense counsel in identifying what might constitute a “significant impairment of national security.”

⁹⁸ *Id.* § 4(A)(5)(b).

⁹⁹ U.S. CONST. Amdt. VI applies in courts-martial. *E.g.* *United States v. Scheffer*, 523 U.S. 303 (1998).

¹⁰⁰ *Maryland v. Craig*, 497 U.S. 836, 845 (1990).

¹⁰¹ The Military Rules of Evidence (Mil. R. Evid.) are contained in the Manual for Courts-Martial (M.C.M.), established as Exec. Order No. 12473, Manual for Courts-Martial, United States, 49 Fed. Reg 17,152, (Apr. 23, 1984), as amended. The M.C.M. also contains the procedural rules for courts-martial, known as the Rules For Courts-Martial (R.C.M.).

¹⁰² Mil. R. Evid. 402.

¹⁰³ Mil. R. Evid. 403 (relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence”).

¹⁰⁴ See R.C.M. 701(a)(6); NIMJ, *supra* note 34, at 31-32.

¹⁰⁵ Mil. R. Evid. 505 provides procedures similar to the Classified Information Protection Act (CIPA) that applies in civilian court.

international law, that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him.”¹⁰⁶

The MCA provides that the “accused shall be permitted to present evidence in his defense, to cross-examine the witnesses who testify against him, and to examine and respond to evidence admitted against him on the issue of guilt or innocence and for sentencing.”¹⁰⁷ It is not clear what evidence might be excluded from this requirement as irrelevant to the issues of guilt, innocence, or appropriate punishment. A likely issue will be whether evidence relevant to the credibility of a witness or the authenticity of a document is permitted to be excluded from the accused’s right to examine and respond to evidence, unless expressly provided elsewhere in the MCA.

Discovery. The MCA provides that defense counsel is to be afforded a reasonable opportunity to obtain witnesses and other evidence, including evidence in the possession of the United States, as specified in regulations prescribed by the Secretary of Defense.¹⁰⁸ Unlike M.C.O. No. 1, the MCA does not expressly direct the prosecution to provide to the accused all of the evidence trial counsel intends to present.¹⁰⁹ However, as noted above, the accused is entitled to examine and respond to evidence relevant to establishing culpability. Both M.C.O. No. 1 and the MCA provide that the accused is entitled to exculpatory information known to the prosecution, with procedures permitting some variance for security concerns.

Like M.C.O. No. 1, the MCA provides for the protection of national security information during the discovery phase of a trial. The military judge must authorize discovery in accordance with rules prescribed by the Secretary of Defense to redact classified information or to provide an unclassified summary or statement describing the evidence.¹¹⁰ However, where M.C.O. No. 1 permitted the withholding of any “Protected Information,”¹¹¹ the MCA permits the government to withhold only properly classified information that has been determined by the head of a government agency or department to require protection because its disclosure could result in harm to the national security.

¹⁰⁶ Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2798 (2006)(while accepting that the government “has a compelling interest in denying [the accused] access to certain sensitive information,” stating that “at least absent express statutory provision to the contrary, information used to convict a person of a crime must be disclosed to him”).

¹⁰⁷ 10 U.S.C. § 949a.

¹⁰⁸ 10 U.S.C. § 949j.

¹⁰⁹ M.C.O. No. 1, § 5(E) (requiring such information, as well as any exculpatory evidence known by the prosecution, to be provided to the accused as long as such information was not deemed to be protected under Sec. 6(D)(5)).

¹¹⁰ 10 U.S.C. § 949j.

¹¹¹ M.C.O. No. 1, § 6 (defining “Protected Information” to include classified or classifiable information, information protected “by law or rule from unauthorized disclosure,” information that could endanger trial participants, intelligence and law enforcement sources, methods or activities, or “information concerning other national security interests”).

The MCA provides for the mandatory production of exculpatory information known to trial counsel (defined as exculpatory evidence that the prosecution would be required to disclose in a general court-martial¹¹²), but does not permit defense counsel or the accused to view classified information. The military judge is authorized to permit substitute information, in particular when trial counsel moves to withhold information pertaining to the sources, methods, or activities by which the information was acquired. The military judge may (but need not) require that the defense and the commission members be permitted to view an unclassified summary of the sources, methods, or activities, to the extent practicable and consistent with national security.¹¹³

Under M.C.O. No. 1, the presiding officer had the authority to permit the deletion of specific items from any information to be made available to the accused or defense counsel, or to direct that unclassified summaries of protected information be prepared.¹¹⁴ The accused was to have access to protected information to be used by the prosecution and exculpatory protected information “to the extent consistent with national security, law enforcement interests, and applicable law.”¹¹⁵ Defense counsel was permitted to view the classified version only if the evidence was to be admitted at trial. The MCA does not provide defense counsel with access to the classified information that serves as the basis for substitute or redacted proffers.

Admissibility of Evidence. The standard for the admissibility of evidence in the MCA remains as it was stated in the M.O.; evidence is admissible if it is deemed to have “probative value to a reasonable person.”¹¹⁶ However, the MCA provides that the military judge is to exclude evidence if its probative value is outweighed by the “danger of unfair prejudice, confusion of the issues, or misleading the commission”; or by “considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”¹¹⁷

¹¹² It is not clear what information would be required to be provided under this subsection. Discovery at court-martial is controlled by R.C.M. 701, which requires trial counsel to provide to the defense any papers accompanying the charges, sworn statements in the possession of trial counsel that relate to the charges, and all documents and tangible objects within the possession or control of military authorities that are material to the preparation of the defense or that are intended for use in the prosecution’s case-in-chief at trial. Exculpatory evidence appears to be a subset of “evidence favorable to the defense,” which includes evidence that tends to negate the guilt of the accused of an offense charged, reduce the degree of guilt, or reduce the applicable punishment.

¹¹³ 10 U.S.C. § 949j.

¹¹⁴ *Id.* § 6(D)(5)(b). Some observers note that protected information could include exculpatory evidence as well as incriminating evidence, which could implicate 6th Amendment rights and rights under the Geneva Convention, if applicable. See HRF, *supra* note 52, at 3.

¹¹⁵ M.C.O. No. 1 § 6(D)(5)(b).

¹¹⁶ M.C.O. No. 1 § 6(D)(1).

¹¹⁷ 10 U.S.C. § 949a(b)(2)(F).

Coerced Statements. The MCA prohibits the use of statements obtained through torture as evidence in a trial, except as proof of torture against a person accused of committing torture. For information obtained through coercion that does not amount to torture, the MCA provides a different standard for admissibility depending on whether the statement was obtained prior to or after the enactment of the DTA. Statements elicited through such methods prior to the DTA are admissible if the military judge finds the “totality of circumstances under which the statement was made renders it reliable and possessing sufficient probative value” and “the interests of justice would best be served” by admission of the statement. Statements taken after passage of the DTA are admissible if, in addition to the two criteria above, the military judge finds that “the interrogation methods used to obtain the statement do not violate the cruel, unusual, or inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution.”

M.C.O. No. 1 did not specifically preclude the admission of coerced evidence. In March 2006, DOD released M.C.I. No. 10 prohibiting prosecutors from introducing, and military commissions from admitting, statements established to have been made as a result of torture.

Hearsay. M.C.O. No. 1 did not exclude hearsay evidence. The MCA allows for the admission of hearsay evidence that would not be permitted under the Manual for Courts-Martial¹¹⁸ only if the proponent of the evidence notifies the adverse party sufficiently in advance of the intention to offer the evidence, as well as the “particulars of the evidence (including [unclassified] information on the general circumstances under which the evidence was obtained).”¹¹⁹ However, the evidence is inadmissible if the party opposing its admission “clearly demonstrates that the evidence is unreliable or lacking in probative value.” An issue may be whether the rules provide for adequate information regarding the source of evidence for an accused to be in a position to refute the reliability of its content.¹²⁰

Classified Evidence. At military commissions convened pursuant to the MCA, classified information is to be protected during all stages of proceedings and is privileged from disclosure for national security purposes.¹²¹ Whenever the original classification authority or head of the agency concerned determines that information is properly classified and its release would be detrimental to the national security, the military judge “shall authorize, to the extent practicable,” the “deletion of specified

¹¹⁸ Mil. R. Evid. 801-807 provide procedures for determining the admissibility of hearsay evidence in courts-martial. It is unclear how, under the MCA, it is to be determined whether certain hearsay evidence would be admissible in a general court-martial.

¹¹⁹ 10 U.S.C. § 949a(b)(3)).

¹²⁰ See *Jencks v. United States*, 353 U.S. 657 (1957) (“Requiring the accused first to show conflict between the reports [in the possession of the government] and the testimony is actually to deny the accused evidence relevant and material to his defense.”).

¹²¹ Defined in 10 U.S.C. §948a(4) as “[a]ny information or material that has been determined by the United States Government pursuant to statute, Executive order, or regulation to require protection against unauthorized disclosure for reasons of national security” and “restricted data, as that term is defined in section 11y of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)).”

items of classified information from documents made available to the accused”; the substitution of a “portion or summary of the information”; or “the substitution of a statement admitting relevant facts that the classified information would tend to prove.” The military judge must consider a claim of privilege and review any supporting materials in camera, and is not permitted to disclose the privileged information to the accused.¹²²

With respect to the protection of intelligence sources and methods relevant to specific evidence, the military judge is required to permit trial counsel to introduce otherwise admissible evidence before the military commission without disclosing the “sources, methods, or activities by which the United States acquired the evidence” if the military judge finds that such information is classified and that the evidence is reliable. The military judge may (but need not) require trial counsel to present an unclassified summary of such information to the military commission and the defense, “to the extent practicable and consistent with national security.”

The MCA does not explicitly provide an opportunity for the accused to contest the admissibility of substitute evidence proffered under the above procedures. It does not appear to permit the accused or his counsel to examine the evidence or a proffered substitute prior to its presentation to the military commission. If constitutional standards required in the Sixth Amendment are held to apply to military commissions, the MCA may be open to challenge for affording the accused an insufficient opportunity to contest evidence. An issue may arise as to whether, where the military judge is permitted to assess the reliability of evidence based on ex parte communication with the prosecution, adversarial testing of the reliability of evidence before the panel members meets constitutional requirements. If the military judge’s determination as to reliability is conclusive, precluding entirely the opportunity of the accused to contest its reliability, the use of such evidence may serve as grounds to challenge the verdict.¹²³ On the other hand, if evidence resulting from classified intelligence sources and methods contains “‘particularized guarantees of trustworthiness’ such that adversarial testing would be expected to add little, if anything, to [its] reliability,”¹²⁴ it may be admissible and survive challenge.

Sentencing

M.C.O. No. 1 required the prosecution to provide in advance to the accused any evidence to be used for sentencing, unless good cause could be shown. The accused was permitted to present evidence and make a statement during sentencing

¹²² 10 U.S.C. § 949d(f)(3).

¹²³ *Cf. Crane v. Kentucky*, 476 U.S. 683 (1986)(evidence about the manner in which a confession was obtained should have been admitted as relevant to its reliability and credibility despite court’s determination that the confession was voluntary and need not be suppressed).

¹²⁴ *Cf. Ohio v. Roberts*, 448 U.S. 56, 66 (1980)(admissibility of hearsay evidence), *but cf. Crawford v. Washington*, 541 U.S. 36 (2004)(“Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. ... [The Confrontation Clause] commands... that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”).

proceedings; however, this right did not appear to mirror the right to make an unsworn statement that military defendants may exercise in regular courts-martial,¹²⁵ and apparently the statements were subject to cross-examination. The MCA provides that the accused is entitled to have access to evidence relevant to sentencing, but does not provide that the accused must be given the opportunity to make a statement.

Possible penalties under M.C.O. No. 1 included execution,¹²⁶ imprisonment for life or any lesser term, payment of a fine or restitution (which may be enforced by confiscation of property subject to the rights of third parties), or “such other lawful punishment or condition of punishment” determined to be proper. Detention associated with the accused’s status as an “enemy combatant” was not to count toward serving any sentence imposed.¹²⁷ Sentences agreed in plea agreements were binding on the commission, unlike regular courts-martial, in which the agreement is treated as the maximum sentence. Similar to the practice in military courts-martial, the death penalty could only be imposed upon a unanimous vote of the commission.¹²⁸ In courts-martial involving any crime punishable by death, however, both the conviction and the death sentence must be by unanimous vote.¹²⁹

The MCA provides that military commissions may adjudge “any punishment not forbidden by [it or the UCMJ], including the penalty of death....”¹³⁰ It specifically proscribes punishment “by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, ... or [by the] use of irons, single or double.”¹³¹ A vote two-thirds of the members present for the vote is required for sentences of up to 10 years. Longer sentences require the concurrence of three-fourths of the members present. The death penalty must be approved unanimously, both as to guilt and to the sentence, by all members present for the vote.

In cases where the death penalty is sought, a panel of 12 members is required (unless the convening authority certifies that 12 members are not “reasonably available” because of physical conditions or military exigencies, in which case no fewer than nine are required), with all members present for the vote agreeing on the

¹²⁵ See NIMJ, *supra* note 34, at 37 (citing United States v. Rosato, 32 M.J. 93, 96 (C.M.A. 1991)).

¹²⁶ The method of execution used by the Army to carry out a death sentence by military commission is lethal injection. See U.S. Army Correctional System: Procedures for Military Executions, AR 190-55 (1999). It is unclear whether DOD will follow these regulations with respect to sentences issued by these military commissions, but it appears unlikely that any such sentences would be carried out at Ft. Leavenworth, in accordance with AR 190-55.

¹²⁷ M.C.I. No. 7 § 3(A).

¹²⁸ M.C.O. No. 1 § 6(F).

¹²⁹ 10 U.S.C. § 851.

¹³⁰ 10 U.S.C. § 948d.

¹³¹ 10 U.S.C. § 949s.

sentence. The death penalty must be expressly authorized for the offense,¹³² and the charges referred to the commission must have expressly sought the penalty of death.¹³³ The death sentence may not be executed until the commission proceedings have been finally adjudged lawful and all appeals are exhausted, and after the President approves the sentence. 10 U.S.C. § 950i(b)-(c). The President is permitted to “commute, remit, or suspend [a death] sentence, or any part thereof, as he sees fit.” 10 U.S.C. § 950i(b). For sentences other than death, the Secretary of the Defense or the convening authority are permitted to adjust the sentence downward. 10 U.S.C. § 950i(d).

Post-Trial Procedure

Criticism leveled at the language of the M.O. included concern that it did not include an opportunity for the accused to appeal a conviction and that it seemingly barred habeas corpus relief.¹³⁴ Other concerns were that it appeared to allow the Secretary of Defense (or the President) the discretion to change the verdict from not guilty to guilty, and that it did not adequately protect persons from double jeopardy.¹³⁵

Review and Appeal. M.C.O. No. 1 addressed some of the above concerns by providing for an administrative review of the trial record by the Appointing Authority and then by a review panel consisting of three military officers, one of whom was required to have experience as a judge. The review panel could, at its discretion, review any written submissions from the prosecution and the defense, who did not necessarily have an opportunity to view or rebut the submission from the opposing

¹³² The MCA permits the death penalty for convictions of murder of a protected person or murder in violation of the law of war, or spying; and if death results, any of the following crimes: attacking civilians, taking hostages, employing poison or similar weapon, using protected persons as a shield, torture or cruel or inhuman treatment, intentionally causing serious bodily injury, maiming, using treachery or perfidy, hijacking or hazarding a vessel or aircraft, terrorism, and conspiracy to commit any of the crimes enumerated in 10 U.S.C. § 950v.

¹³³ 10 U.S.C. § 949m.

¹³⁴ Persons subject to the M.O. were described as not privileged to “seek any remedy or maintain any proceeding, directly or indirectly” in federal or state court, the court of any foreign nation, or any international tribunal. M.O. at § 7(b). However, the Administration originally indicated that defendants were permitted to petition a federal court for a writ of habeas corpus to challenge the jurisdiction of the military commission. *See Alberto R. Gonzales, Martial Justice, Full and Fair*, NEW YORK TIMES (op-ed), Nov. 30, 2001 (stating that the original M.O. was not intended to preclude habeas corpus review). *Rasul v. Bush* clarified that the detainees at Guantanamo Bay do have access to federal courts, but the extent to which the findings of military commissions will be reviewable was not clarified. 124 S. Ct. 2686 (2004). Congress, by enacting the DTA and the MCA, has revoked the jurisdiction of federal courts over habeas corpus petitions filed by or on behalf of aliens detained by the United States as enemy combatants. For an analysis of the habeas provisions in these Acts, see CRS Report RL33180, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, by Jennifer K. Elsea and Kenneth Thomas.

¹³⁵ See Laurence H. Tribe, *Trial by Fury*, THE NEW REPUBLIC, Dec. 10, 2001.

party.¹³⁶ The review panel, upon forming a “firm and definite conviction that a material error of law occurred,” could return the case to the appointing authority for further proceedings. The Appointing Authority was bound to dismiss a charge if the review panel determined that one or more charges should be dismissed.¹³⁷ For other cases involving errors, the Appointing Authority was required to return the case to the military commission. Otherwise, the case was to be forwarded to the Secretary of Defense with a written recommendation. (Under the UCMJ, the trial record of a military commission would be forwarded to the appropriate JAG first.)¹³⁸ After reviewing the record, the Secretary of Defense was to forward the case to the President, or he could return it for further proceedings for any reason, not explicitly limited to material errors of law. The M.C.O. did not indicate what “further proceedings” might entail, or what was to happen to a case that had been “disapproved.”

The MCA provides for the establishment of a new review body, the Court of Military Commission Review (CMCR), comprised of appellate military judges who meet the same qualifications as military judges or comparable qualifications for civilian judges.¹³⁹ The accused may appeal a final decision of the military commission with respect to issues of law to the CMCR. If this appeal fails, the accused may appeal the final decision to the United States Court of Appeals for the District of Columbia Circuit.¹⁴⁰ Appellate court decisions may be reviewed by the Supreme Court under writ of certiorari.¹⁴¹

Like the UCMJ, the MCA prohibits the invalidation of a verdict or sentence due to an error of law unless the error materially prejudices the substantial rights of the

¹³⁶ The convening authority of a general court-martial is required to consider all matters presented by the accused. 10 U.S.C. § 860. The MCA contains a similar provision. 10 U.S.C. § 950b.

¹³⁷ M.C.I. No. 9 § 4(C).

¹³⁸ 10 U.S.C. § 8037 (listing among duties of Air Force Judge Advocate General to “receive, revise, and have recorded the proceedings of ... military commissions”); 10 U.S.C. § 3037 (similar duty ascribed to Army Judge Advocate General).

¹³⁹ 10 U.S.C. § 950f.

¹⁴⁰ 10 U.S.C. § 950g. No collateral attack on the verdict is permitted. 10 U.S.C. § 949j(b) provides that

Except as otherwise provided in this chapter and notwithstanding any other provision of law (including section 2241 of title 28 or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.

¹⁴¹ 10 U.S.C. § 950g.

accused.¹⁴² The M.C.O. did not contain such explicit prohibition, but M.C.I. No. 9 defined “Material Error of Law” to exclude variances from the M.O. or any of the military orders or instructions promulgated under it that would not have had a material effect on the outcome of the military commission.¹⁴³ M.C.I. No. 9 allowed the review panel to recommend the disapproval of a finding of guilty on a basis other than a material error of law,¹⁴⁴ but did not indicate what options the review panel would have with respect to findings of not guilty.

Protection against Double Jeopardy. The M.C.O. provided that the accused could not be tried for the same charge twice by any military commission once the commission’s finding on that charge became final (meaning once the verdict and sentence had been approved).¹⁴⁵ Therefore, apparently, jeopardy did not attach — there would not have been a “trial” — until the final verdict was approved by the President or the Secretary of Defense. In contrast, at general courts-martial, jeopardy attaches after the first introduction of evidence by the prosecution. If a charge is dismissed or is terminated by the convening authority after the introduction of evidence but prior to a finding, through no fault of the accused, or if there is a finding of not guilty, the trial is considered complete for purposes of jeopardy, and the accused may not be tried again for the same charge by any U.S. military or federal court without the consent of the accused.¹⁴⁶ Although M.C.O. No. 1 provided that an authenticated verdict¹⁴⁷ of not guilty by the commission could not be changed to guilty,¹⁴⁸ the rules allowed either the Secretary of Defense or the President to disapprove the finding and return the case for “further proceedings” prior to the findings’ becoming final, regardless of the verdict. The possibility that a finding of not guilty could be referred back to the commission for rehearing may have had double jeopardy implications.¹⁴⁹

Like M.C.O. No. 1, the MCA provides that “[n]o person may, without his consent, be tried by a military commission under this chapter a second time for the

¹⁴² 10 U.S.C. § 859; 10 U.S.C. § 950a(a).

¹⁴³ M.C.I. No. 9 § 4(C)(2)(a).

¹⁴⁴ M.C.I. No. 9 § 4(C)(1)(b).

¹⁴⁵ M.C.O. No. 1 § 5(P). The finding was to become final when “the President or, if designated by the President, the Secretary of Defense makes a final decision thereon pursuant to Section 4(c)(8) of the President’s Military Order and in accordance with Section 6(H)(6) of [M.C.O. No. 1].” Id. § 6(H)(2).

¹⁴⁶ 10 U.S.C. § 844. Federal courts and U.S. military courts are considered to serve under the same sovereign for purposes of double (or former) jeopardy.

¹⁴⁷ In regular courts-martial, the record of a proceeding is “authenticated,” or certified as to its accuracy, by the military judge who presided over the proceeding. R.C.M. 1104. None of the military orders or instructions establishing procedures for military commissions explains what is meant by “authenticated finding.”

¹⁴⁸ M.C.O. No. 1 § 6(H)(2).

¹⁴⁹ The UCMJ does not permit rehearing on a charge for which the accused is found on the facts to be not guilty.

same offense.”¹⁵⁰ Jeopardy attaches when a guilty finding becomes final after review of the case has been fully completed. *Id.* The MCA prevents double jeopardy by expressly eliminating the possibility that a finding that amounts to a verdict of not guilty is subject to reversal by the convening authority or to review by the CMCR or the D.C. Circuit. The severity of a sentence adjudged by the military commission cannot be increased on rehearing unless the sentence prescribed for the offense is mandatory. 10 U.S.C. § 950b(d)(2)(B).

M.C.O. No. 1 did not provide a specific form for the charges, and did not require that they be authenticated by an oath or signature.¹⁵¹ The inadequacy of an indictment in specifying charges could raise double jeopardy concerns.¹⁵² If the charge does not adequately describe the offense, another trial for the same offense under a new description is not as easily prevented. The MCA requires that charges and specifications be signed under oath by a person with personal knowledge or reason to believe that matters set forth therein are true. 10 U.S.C. § 948q. The charges must be served on the accused written in a language he understands. 10 U.S.C. § 948s. There is no express requirement regarding the specificity of the charges.

The M.O. also left open the possibility that a person subject to the order might be transferred at any time to some other governmental authority for trial.¹⁵³ A federal criminal trial, as a trial conducted under the same sovereign as a military commission, could have double jeopardy implications if the accused had already been tried by military commission for the same crime or crimes, even if the commission proceedings did not result in a final verdict. The federal court would face the issue of whether jeopardy had already attached prior to the transfer of the individual from military control to other federal authorities. The MCA does not expressly prohibit trial in another forum.

Conversely, the M.O. provided that the President may determine at any time that an individual is subject to the M.O., at which point any state or federal authorities holding the individual would be required to turn the accused over to military authorities. If the accused were already the subject of a federal criminal trial under charges for the same conduct that resulted in the President’s determination that the accused is subject to the M.O., and if jeopardy had already attached in the federal trial, double jeopardy could be implicated by a new trial before a military commission. Neither the MCA nor M.C.O. No. 1 explicitly provides for a double jeopardy defense under such circumstances.

The following charts provide a comparison of the military tribunals under the regulations issued by the Department of Defense, standard procedures for general courts-martial under the Manual for Courts-Martial, and military tribunals as authorized by the Military Commissions Act of 2006. **Table 1** compares the legal

¹⁵⁰ 10 U.S.C. § 949h.

¹⁵¹ See M.C.O. No. 1 § 6(A)(1).

¹⁵² See NIMJ, *supra* note 34, at 39.

¹⁵³ M.O. § 7(e).

authorities for establishing military tribunals, the jurisdiction over persons and offenses, and the structures of the tribunals. **Table 2**, which compares procedural safeguards incorporated in the previous DOD regulations (in force prior to the *Hamdan* decision and the enactment of the MCA) and the UCMJ, follows the same order and format used in CRS Report RL31262, *Selected Procedural Safeguards in Federal, Military, and International Courts*, in order to facilitate comparison of the proposed legislation to safeguards provided in federal court, the international military tribunals that tried World War II crimes at Nuremberg and Tokyo, and contemporary ad hoc tribunals set up by the UN Security Council to try crimes associated with hostilities in the former Yugoslavia and Rwanda.

Table 1. Comparison of Courts-Martial and Military Commission Rules

| | General Courts Martial | Military Commission Order No. 1 (M.C.O.) | Military Commissions Act of 2006 |
|------------------|---|---|---|
| Authority | U.S. Constitution, Article I, § 8. | U.S. Constitution, Article II; Presidential Military Order of Nov. 13, 2001 (M.O.). | U.S. Constitution, Article I, § 8. |
| Procedure | Rules are provided by the Uniform Code of Military Justice (UCMJ), chapter 47, title 10, and the Rules for Courts-Martial (R.C.M.) and the Military Rules of Evidence (Mil. R. Evid.), issued by the President pursuant to art. 36, UCMJ. 10 U.S.C. § 836. | <p>Rules are issued by the Secretary of Defense pursuant to the M.O. No other rules apply (presumably excluding the UCMJ). § 1.</p> <p>The President declared it “impracticable” to employ procedures used in federal court, pursuant to 10 U.S.C. § 836.</p> | <p>The Secretary of Defense may prescribe rules of evidence and procedure for trial by a military commission. The rules may not be inconsistent with the MCA. Rules of procedure and evidence applicable to courts-martial under the UCMJ are to apply to military commissions except where otherwise specified. 10 U.S.C. § 949a(a).</p> <p>The Secretary of Defense, in consultation with the Attorney General, may make exceptions to UCMJ procedural rules “as may be required by the unique circumstances of the conduct of military and intelligence operations during hostilities or by other practical need.” 10 U.S.C. § 949a(b).</p> <p>However, the rules must include certain rights as listed in § 949a(b)(2). Specific UCMJ provisions the Secretary may except are listed in § 949a(b)(3).</p> |

| | General Courts Martial | Military Commission Order No. 1 (M.C.O.) | Military Commissions Act of 2006 |
|----------------------------------|---|--|--|
| Jurisdiction over Persons | <p>Members of the armed forces, cadets, midshipmen, reservists while on inactive-duty training, members of the National Guard or Air National Guard when in federal service, prisoners of war in custody of the armed forces, civilian employees accompanying the armed forces in time of declared war, and certain others, including “persons within an area leased by or otherwise reserved or acquired for the use of the United States.”</p> <p>10 U.S.C. § 802; United States v. Averette, 17 USCMA 363 (1968) (holding “in time of war” to mean only wars declared by Congress.</p> <p>Individuals who are subject to military tribunal jurisdiction under the law of war may also be tried by general court martial.</p> <p>10 U.S.C. § 818.</p> | <p>Individual subject to M.O., determined by President to be:</p> <ol style="list-style-type: none"> 1. a non-citizen, and 2. a member of Al Qaeda or person who has engaged in acts related to terrorism against the United States, or who has harbored one or more such individuals <p>and is referred to the commission by the Appointing Authority.</p> <p>§ 3(A).</p> | <p>Any “alien unlawful combatant” is subject to trial by military commission.</p> <p>10 U.S.C. § 948c.</p> <p>An “unlawful enemy combatant” is “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents”; or a person determined to be an unlawful enemy combatant by a CSRT or other competent tribunal established under the authority of the President or the Secretary of Defense, which determination is dispositive of status. 10 U.S.C. §§ 948a and 948d(c).</p> <p>“Lawful combatant” is defined in terms of GPW Art. 4. Proposed 10 U.S.C. § 948a(2).</p> |

| | General Courts Martial | Military Commission Order No. 1 (M.C.O.) | Military Commissions Act of 2006 |
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| Jurisdiction over Offenses | Any offenses made punishable by the UCMJ; offenses subject to trial by military tribunal under the law of war. 10 U.S.C. § 818. | Offenses in violation of the laws of war and all other offenses triable by military commission. § 3(B). M.C.I. No. 2 clarifies that terrorism and related crimes are “crimes triable by military commission.” These include (but are not limited to): willful killing of protected persons; attacking civilians; attacking civilian objects; attacking protected property; pillaging; denying quarter; taking hostages; employing poison or analogous weapons; using protected persons as shields; using protected property as shields; torture; causing serious injury; mutilation or maiming; use of treachery or perfidy; improper use of flag of truce; improper use of protective emblems; degrading treatment of a dead body; and rape; hijacking or hazarding a vessel or aircraft; terrorism; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; aiding the enemy; spying; perjury or false testimony; and obstruction of justice; aiding or abetting; solicitation; command/superior responsibility - perpetrating; command/superior responsibility - misprision; accessory after the fact; conspiracy; and attempt. | Offenses include the following: murder of protected persons; attacking civilians, civilian objects, or protected property; pillaging; denying quarter; taking hostages; employing poison or similar weapons; using protected persons or property as shields; torture, cruel or inhuman treatment; intentionally causing serious bodily injury; mutilating or maiming; murder in violation of the law of war; destruction of property in violation of the law of war; using treachery or perfidy; improperly using a flag of truce or distinctive emblem; intentionally mistreating a dead body; rape; sexual assault or abuse; hijacking or hazarding a vessel or aircraft; terrorism; providing material support for terrorism; wrongfully aiding the enemy; spying, contempt; perjury and obstruction of justice. Proposed 10 U.S.C. § 950v. Conspiracy (§ 950v(b)(28)), attempts (§ 950t), and solicitation (§ 950u) to commit the defined acts are also punishable. |

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| Composition | A military judge and not less than five members, or if requested, except in capital cases, a military judge alone. R.C.M. 501. | From three to seven members, as determined by the Appointing Authority. § 4(A)(2). | A military judge and at least five members, 10 U.S.C. § 948m, unless the death penalty is sought, in which case no fewer than 12 members must be included, 10 U.S.C. § 949m(c). |

Source: Congressional Research Service.

Table 2. Comparison of Procedural Safeguards

| | General Courts Martial | Military Commission Order No. 1 (M.C.O.) | Military Commissions Act of 2006 |
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| Presumption of Innocence | <p>If the defendant fails to enter a proper plea, a plea of not guilty will be entered. R.C.M. 910(b).</p> <p>Members of court martial must be instructed that the “accused must be presumed to be innocent until the accused’s guilt is established by legal and competent evidence beyond a reasonable doubt.” R.C.M. 920(e).</p> <p>The accused shall be properly attired in uniform with grade insignia and any decorations to which entitled. Physical restraint shall not be imposed unless prescribed by the military judge. R.C.M. 804.</p> | <p>The accused shall be presumed innocent until proven guilty. § 5(B).</p> <p>Commission members must base their vote for a finding of guilty on evidence admitted at trial. §§ 5(C); 6(F).</p> <p>The Commission must determine the voluntary and informed nature of any plea agreement submitted by the accused and approved by the Appointing Authority before admitting it as stipulation into evidence. § 6(B).</p> | <p>Before a vote is taken on the findings, the military judge must instruct the commission members “that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt.” 10 U.S.C. § 949l.</p> <p>If an accused refuses to enter a plea or pleads guilty but provides inconsistent testimony, or if it appears that he lacks proper understanding of the meaning and effect of the guilty plea, the commission must treat the plea as denying guilt. 10 U.S.C. § 949i.</p> |
| Right to Remain Silent | <p>Coerced confessions or confessions made in custody without statutory equivalent of Miranda warning are not admissible as evidence, unless a narrow “public safety” exception applies. Art. 31, UCMJ, 10 U.S.C. § 831.</p> <p>Once a suspect is in custody or charges have been preferred, the suspect or accused has the right to have counsel present for questioning. Once the right to counsel is invoked, questioning material to the allegations or charges must stop. Mil. R. Evid. 305(d)(1).</p> | <p>Not provided. Neither the M.O. nor M.C.O. requires a warning or bars the use of statements made during military interrogation, or any coerced statement, from military commission proceedings. Art. 31(a), UCMJ (10 U.S.C. § 831) bars persons subject to it from compelling any individual to make a confession, but there does not appear to be a remedy in case of violation. No person subject to the UCMJ may compel any person to give evidence before any military tribunal if the evidence is not material to the issue and may tend to degrade him. 10 U.S.C. § 831.</p> | <p>Article 31, UCMJ, is expressly made inapplicable. 10 U.S.C. § 948b(d).</p> <p>Confessions allegedly elicited through coercion or compulsory self-incrimination that are otherwise admissible are not to be excluded at trial unless violates section 948r. 10 U.S.C. § 949a(b)(2)(C).</p> <p>Section 948r provides that statements elicited through torture may not be entered into evidence except to prove a charge of torture.</p> |

| | General Courts Martial | Military Commission Order No. 1 (M.C.O.) | Military Commissions Act of 2006 |
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| | <p>The prosecutor must notify the defense of any incriminating statements made by the accused that are relevant to the case prior to the arraignment. Motions to suppress such statements must be made prior to pleading. Mil. R. Evid. 304.</p> <p>Interrogations conducted by foreign officials do not require warnings or presence of counsel unless the interrogation is instigated or conducted by U.S. military personnel. Mil. R. Evid. 305.</p> | | <p>Statements obtained prior to the enactment of the DTA through coercion that does not amount to torture is admissible if the military judge finds that 1. The “totality of circumstances under which the statement was made renders it reliable and possessing sufficient probative value” and 2. “the interests of justice would best be served” by admission of the statement.</p> <p>Statements taken after passage of the DTA would be admissible if the military judge also finds that 3. “the interrogation methods used to obtain the statement do not violate the cruel, unusual, or inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution.” 10 U.S.C. § 948r.</p> |

| | General Courts Martial | Military Commission Order No. 1 (M.C.O.) | Military Commissions Act of 2006 |
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| Freedom from Unreasonable Searches & Seizures | <p>“Evidence obtained as a result of an unlawful search or seizure … is inadmissible against the accused …” unless certain exceptions apply. Mil. R. Evid. 311.</p> <p>“Authorization to search” may be oral or written, and may be issued by a military judge or an officer in command of the area to be searched, or if the area is not under military control, with authority over persons subject to military law or the law of war. It must be based on probable cause. Mil. R. Evid. 315.</p> <p>Interception of wire and oral communications within the United States requires judicial application in accordance with 18 U.S.C. §§ 2516 <i>et seq.</i> Mil. R. Evid. 317.</p> <p>A search conducted by foreign officials is unlawful only if the accused is subject to “gross and brutal treatment.” Mil. R. Evid. 311(c).</p> | <p>Not provided; no exclusionary rule appears to be available.</p> <p>However, monitored conversations between the detainee and defense counsel may not be communicated to persons involved in prosecuting the accused or used at trial. M.C.O. No. 3.</p> <p>No provisions for determining probable cause or issuance of search warrants are included.</p> <p>Insofar as searches and seizures take place outside of the United States against non-U.S. persons, the Fourth Amendment may not apply. <i>United States v. Verdugo-Urquidez</i>, 494 U.S. 259 (1990).</p> | <p>Not provided. Evidence is generally permitted if it has probative value to a reasonable person, unless it is obtained under circumstances that would render it unreliable. 10 U.S.C. §§ 948r, 949a.</p> <p>Procedural rules may provide that evidence gathered without authorization or a search warrant may be admitted into evidence. 10 U.S.C. § 949a.</p> |
| Assistance of Effective Counsel | <p>The defendant has a right to military counsel at government expense. The defendant may choose counsel, if that attorney is reasonably available, and may hire a civilian attorney in addition to military counsel. Art 38, UCMJ, 10 U.S.C. § 838.</p> <p>Appointed counsel must be certified as qualified and may not be someone who has taken any part in the investigation or prosecution, unless explicitly requested by the</p> | <p>M.C.O. 1 provides that the accused must be represented “at all relevant times” (presumably, once charges are approved until findings are final — but not for individuals who are detained but not charged) by detailed defense counsel. § 4(C)(4).</p> <p>The accused is assigned a military judge advocate to serve as counsel, but may request to replace or augment the detailed counsel</p> | <p>At least one qualifying military defense counsel is to be detailed “as soon as practicable after the swearing of charges....” 10 U.S.C. § 948k.</p> <p>The accused may also hire a civilian attorney who is</p> <ol style="list-style-type: none"> 1. a U.S. citizen, 2. admitted to the bar in any state, district, or possession, 3. has never been disciplined, |

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| | <p>defendant. Art. 27, UCMJ, 10 U.S.C. § 827.</p> <p>In espionage cases or other cases in which classified information may be necessary to prove a charge or defense, the defense is permitted to request the information and to have the military judge review <i>in camera</i> information for which the government asserts a privilege. The accused and the defense attorney are entitle to be present for such <i>in camera</i> hearings, and although the government is not generally required to give them access to the classified information itself, the military judge may disapprove of any summary the government provides for the purpose of permitting the defense to prepare adequately for the hearing, and may subject the government to sanctions if it declines to make the necessary information available. Mil. R. Evid. 505.</p> <p>The military judge may order all persons requiring security clearances to cooperate with investigatory personnel in any investigations which are necessary to obtain the security clearance necessary to participate in the proceedings. Mil. R. Evid. 505(g).</p> <p>The attorney-client privilege is honored. Mil. R. Evid. 502.</p> | <p>with a specific officer, if that person is available. § 4(C)(3)(a).</p> <p>The accused may also hire a civilian attorney who is a U.S. citizen, is admitted to the bar in any state, district, or possession, has a SECRET clearance (or higher, if necessary for a particular case), and agrees to comply with all applicable rules. The civilian attorney does not replace the detailed counsel, and is not guaranteed access to classified evidence or closed hearings. § 4(C)(3)(b).</p> <p>Defense Counsel may present evidence at trial and cross-examine witnesses for the prosecution. § 5(I).</p> <p>The Appointing Authority must order such resources be provided to the defense as he deems necessary for a full and fair trial.” § 5(H).</p> <p>Communications between defense counsel and the accused are subject to monitoring by the government. Although information obtained through such monitoring may not be used as evidence against the accused, M.C.I. No. 3, the monitoring could arguably have a chilling effect on attorney-client conversations, possibly hampering the ability of defense counsel to provide effective representation.</p> | <p>4. has a SECRET clearance (or higher, if necessary for a particular case), and 5. agrees to comply with all applicable rules. 10 U.S.C. § 949c(b)(3).</p> <p>If civilian counsel is hired, the detailed military counsel serves as associate counsel. 10 U.S.C. § 949c(b)(5).</p> <p>No attorney-client privilege is mentioned.</p> <p>Adverse personnel actions may not be taken against defense attorneys because of the zeal with which such officer, in acting as counsel, represented any accused before a military commission....” 10 U.S.C. § 949b.</p> |

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| Right to Indictment and Presentment | <p>The right to indictment by grand jury is explicitly excluded in “cases arising in the land or naval forces.” Amendment V.</p> <p>However, a process similar to a grand jury is required by article 32, UCMJ. 10 U.S.C. § 832.</p> <p>Whenever an offense is alleged, the commander is responsible for initiating a preliminary inquiry and deciding how to dispose of the offense. R.C.M. 303-06.</p> <p>The accused must be informed of the charges as soon as practicable. Art. 30, UCMJ, 10 U.S.C. § 830.</p> | <p>Probably not applicable to military commissions, provided the accused is an enemy belligerent. <i>See Ex parte Quirin</i>, 317 U.S. 1 (1942).</p> <p>The Office of the Chief Prosecutor prepares charges for referral by the Appointing Authority. § 4(B).</p> <p>There is no requirement for an impartial investigation prior to a referral of charges. The Commission may adjust a charged offense in a manner that does not change the nature or increase the seriousness of the charge. § 6(F).</p> | <p>Article 32, UCMJ, hearings are expressly made inapplicable. 10 U.S.C. § 948b(d)(1)(C).</p> <p>Charges and specifications against an accused are to be signed by a person subject to UCMJ swearing under oath that the signer has “personal knowledge of, or reason to believe, the matters set forth therein,” and that they are “true in fact to the best of his knowledge and belief.” The accused is to be informed of the charges and specifications against him as soon as practicable after charges are sworn. 10 U.S.C. § 948q.</p> |
| Right to Written Statement of Charges | <p>Charges and specifications must be signed under oath and made known to the accused as soon as practicable. Art. 30, UCMJ, 10 U.S.C. § 830.</p> | <p>Copies of approved charges are provided to the accused and Defense Counsel in English and another language the accused understands, if appropriate. § 5(A).</p> | <p>The trial counsel assigned is responsibility for serving counsel a copy of the charges upon the accused, in English and, if appropriate, in another language that the accused understands, “sufficiently in advance of trial to prepare a defense.” 10 U.S.C. § 948s.</p> |
| Right to be Present at Trial | <p>The presence of the accused is required during arraignment, at the plea, and at every stage of the court-martial unless the accused waives the right by voluntarily absenting him or herself from the proceedings after the arraignment or by persisting in conduct that justifies the trial judge in ordering the removal of the accused from the proceedings. R.C.M. 801.</p> <p>The government may introduce redacted or summarized versions of evidence to be</p> | <p>The accused may be present at every stage of trial before the Commission unless the Presiding Officer excludes the accused because of disruptive conduct or for security reasons, or “any other reason necessary for the conduct of a full and fair trial.” §§ 4(A)(5)(a); 5(K); 6B(3).</p> | <p>The accused has the right to be present at all sessions of the military commission except deliberation or voting, unless exclusion of the accused is permitted under § 949d. 10 U.S.C. § 949a(b)(1)(B).</p> <p>The accused may be excluded from attending portions of the proceeding if the military judge determines that the accused persists in disruptive or dangerous conduct. 10 U.S.C. § 949d(e).</p> |

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| | substituted for classified information properly claimed under privilege, but there is no provision that would allow court-martial members (other than the non-voting military judge) to view evidence that is not seen by the accused. Mil. R. Evid. 505. | | |
| Prohibition against Ex Post Facto Crimes | Courts-martial will not enforce an ex post facto law, including increasing amount of pay to be forfeited for specific crimes. United States v. Gorki, 47 M.J. 370 (1997). | Not provided, but may be implicit in restrictions on jurisdiction over offenses. <i>See</i> § 3(B). M.C.I. No. 2 § 3(A) provides that “no offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question.” | Crimes punishable by military commissions under the new chapter are contained in subchapter VII. It includes the crime of conspiracy, which a plurality of the Supreme Court in <i>Hamdan v. Rumsfeld</i> viewed as invalid as a charge of war crimes. 548 U.S. __ (2006). The Act declares that it “codif[ies] offenses that have traditionally been triable by military commissions,” and that “because the [defined crimes] (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of enactment.” 10 U.S.C. § 950p. The bill expressly provides jurisdiction over the defined crimes, whether committed prior to, on or after September 11, 2001. 10 U.S.C. § 948d. |
| Protection against Double Jeopardy | Double jeopardy clause applies. See Wade v. Hunter, 336 US 684, 688-89 (1949). Art. 44, UCMJ prohibits double jeopardy, provides for jeopardy to attach after introduction of evidence. 10 U.S.C. § 844. | The accused may not be tried again by any Commission for a charge once a Commission’s finding becomes final. (Jeopardy appears to attach when the finding becomes final, at least with respect to subsequent U.S. military commissions.) § 5(P). | “No person may, without his consent, be tried by a commission a second time for the same offense.” Jeopardy attaches when a guilty finding becomes final after review of the case has been fully completed. 10 U.S.C. § 949h. The United States may not appeal a an order or ruling that amounts to a finding of not |

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| | <p>General court-martial proceeding is considered to be a federal trial for double jeopardy purposes. Double jeopardy does not result from charges brought in state or foreign courts, although court-martial in such cases is disfavored.</p> <p>U. S. v. Stokes, 12 M.J. 229 (C.M.A. 1982).</p> <p>Once military authorities have turned service member over to civil authorities for trial, military may have waived jurisdiction for that crime, although it may be possible to charge the individual for another crime arising from the same conduct.</p> <p><i>See</i> 54 AM. JUR. 2D, Military and Civil Defense §§ 227-28.</p> | <p>However, although a finding of Not Guilty by the Commission may not be changed to Guilty, either the reviewing panel, the Appointing Authority, the Secretary of Defense, or the President may return the case for “further proceedings” prior to the findings’ becoming final. If a finding of Not Guilty is vacated and retried, double jeopardy may be implicated.</p> <p>The order does not specify whether a person already tried by any other court or tribunal may be tried by a military commission under the M.O. The M.O. reserves for the President the authority to direct the Secretary of Defense to transfer an individual subject to the M.O. to another governmental authority, which is not precluded by the order from prosecuting the individual. This subsection could be read to authorize prosecution by federal authorities after the individual was subject to trial by military commission, although a federal court would likely dismiss such a case on double jeopardy grounds.</p> <p>M.O. § 7(e).</p> | <p>guilty. 10 U.S.C. § 950d(a)(2).</p> <p>The convening authority may not revise findings or order a rehearing in any case to reconsider a finding of not guilty of any specification or a ruling which amounts to a finding of not guilty, or reconsider a finding of not guilty of any charge, unless there has been a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation. The convening authority may not increase the severity of the sentence unless the sentence prescribed for the offense is mandatory.</p> <p>10 U.S.C. § 950b(d)(2)(B).</p> |
| Speedy & Public Trial | <p>In general, accused must be brought to trial within 120 days of the preferral of charges or the imposition of restraint, whichever date is earliest.</p> <p>R.C.M. 707(a).</p> <p>The right to a public trial applies in courts-martial but is not absolute.</p> <p>R.C.M. 806.</p> <p>The military trial judge may exclude the public from portions of a proceeding for the</p> | <p>The Commission is required to proceed expeditiously, “preventing any unnecessary interference or delay.”</p> <p>§ 6(B)(2).</p> <p>Failure to meet a specified deadline does not create a right to relief. § 10.</p> <p>The rules do not prohibit detention without charge, or require charges to be brought within</p> | <p>There is no right to a speedy trial. Article 10, UCMJ, 10 U.S.C. § 810, is expressly made inapplicable to military commissions. 10 U.S.C. § 948b(c).</p> <p>The military judge may close all or part of a trial to the public only after making a determination that such closure is necessary to protect information, the disclosure of which would be harmful to national security</p> |

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| | <p>purpose of protecting classified information if the prosecution demonstrates an overriding need to do so and the closure is no broader than necessary.</p> <p>United States v. Grunden, 2 M.J. 116 (CMA 1977); Mil. R. Evid. 505(j).</p> | <p>a specific time period.</p> <p>Proceedings “should be open to the maximum extent possible,” but the Appointing Authority has broad discretion to close hearings, and may exclude the public or accredited press from open proceedings.</p> <p>§ 6(B)(3).</p> | <p>interests or to the physical safety of any participant.</p> <p>10 U.S.C. § 949d(d).</p> |
| Burden & Standard of Proof | <p>Members of court martial must be instructed that the burden of proof to establish guilt is upon the government and that any reasonable doubt must be resolved in favor of the defendant.</p> <p>R.C.M. 920(e).</p> | <p>Commission members may vote for a finding of guilty only if convinced beyond a reasonable doubt, based on evidence admitted at trial, that the accused is guilty.</p> <p>§§ 5(C); 6(F).</p> <p>The burden of proof of guilt is on the prosecution, § 5(C); however, M.C.I. No. 2 states that element of wrongfulness of an offense is to be inferred absent evidence to the contrary. M.C.I. No. 2 § 4(B).</p> | <p>Commission members are to be instructed that the accused is presumed to be innocent until his “guilt is established by legal and competent evidence beyond reasonable doubt”; that any reasonable doubt as to the guilt of the accused must be “resolved in favor of the accused and he must be acquitted”; that reasonable doubt as to the degree of guilt must be resolved in favor of the lower degree as to which there is no reasonable doubt; and that the burden of proof is upon the United States. 10 U.S.C. § 949l.</p> <p>Two-thirds of the members must concur on a finding of guilty, except in capital cases. 10 U.S.C. § 949m.</p> <p>The military judge is to exclude any evidence the probative value of which is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members of the commission, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.</p> <p>10 U.S.C. § 949a.</p> |

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| Privilege Against Self-Incrimination | <p>No person subject to the UCMJ may compel any person to answer incriminating questions. Art. 31(a) UCMJ, 10 U.S.C. § 831(a).</p> <p>Defendant may not be compelled to give testimony that is immaterial or potentially degrading. Art. 31(c), UCMJ, 10 U.S.C. § 831(c).</p> <p>No adverse inference is to be drawn from a defendant's refusal to answer any questions or testify at court-martial. Mil. R. Evid. 301(f). Witnesses may not be compelled to give testimony that may be incriminating unless granted immunity for that testimony by a general court-martial convening authority, as authorized by the Attorney General, if required. 18 U.S.C. § 6002; R.C.M. 704.</p> | <p>The accused is not required to testify, and the commission may draw no adverse inference from, a refusal to testify. § 5(F).</p> <p>However, there is no rule against the use of coerced statements as evidence.</p> <p>There is no specific provision for immunity of witnesses to prevent their testimony from being used against them in any subsequent legal proceeding; however, under 18 U.S.C. §§ 6001 <i>et seq.</i>, a witness required by a military tribunal to give incriminating testimony is immune from prosecution in any criminal case, other than for perjury, giving false statements, or otherwise failing to comply with the order. 18 U.S.C. §§ 6002; 6004.</p> | <p>"No person shall be required to testify against himself at a commission proceeding." 10 U.S.C. § 948r.</p> <p>Adverse inferences drawn from a failure to testify are not expressly prohibited; however, members are to be instructed that "the accused must be presumed to be innocent until his guilt is established by legal and competent evidence" 10 U.S.C. § 949l.</p> <p>There does not appear to be a provision for immunity of witnesses.</p> |

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| Right to Examine or Have Examined Adverse Witnesses | <p>Hearsay rules apply as in federal court. Mil. R. Evid. 801 et seq.</p> <p>In capital cases, sworn depositions may not be used in lieu of witness, unless court-martial is treated as non-capital or it is introduced by the defense. Art. 49, UCMJ, 10 U.S.C. § 849.</p> <p>The government may claim a privilege not to disclose classified evidence to the accused, and the military judge may authorize the deletion of specified items of classified information, substitute a portion or summary, or statement admitting relevant facts that the evidence would tend to prove, unless the military judge determines that disclosure of classified information itself is necessary to enable the accused to prepare for trial. Mil. R. Evid. 505(g).</p> | <p>Defense Counsel may cross-examine the prosecution's witnesses who appear before the Commission. § 5(I).</p> <p>However, the Commission may also permit witnesses to testify by telephone or other means not requiring the presence of the witness at trial, in which case cross-examination may be impossible. § 6(D)(2).</p> <p>In the case of closed proceedings or classified evidence, only the detailed defense counsel may be permitted to participate. Hearsay evidence is admissible as long as the Commission determines it would have probative value to a reasonable person. § 6(D)(1).</p> <p>The Commission may consider testimony from prior trials as well as sworn and unsworn written statements, apparently without regard to the availability of the declarant, in apparent contradiction with 10 U.S.C. § 849. § 6(D)(3).</p> | <p>"Defense counsel may cross-examine each witness for the prosecution who testifies before the commission." 10 U.S.C. § 949c.</p> <p>In the case of classified information, the military judge may authorize the government to delete specified portions of evidence to be made available to the accused, or may allow an unclassified summary or statement setting forth the facts the evidence would tend to prove, to the extent practicable in accordance with the rules used at general courts-martial. 10 U.S.C. § 949d(f)(2)(A).</p> <p>Hearsay evidence not admissible under the rules of evidence applicable in trial by general courts-martial is admissible only if the proponent notifies the adverse party, sufficiently in advance of its intention to offer the evidence, and the particulars of the evidence (including information on the general circumstances under which the evidence was obtained) unless the party opposing the admission of the evidence "clearly demonstrates that the evidence is unreliable or lacking in probative value." 10 U.S.C. § 949a(b)(2)(E).</p> |

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| Right to Compulsory Process to Obtain Witnesses | <p>Defendants before court-martial have the right to compel appearance of witnesses necessary to their defense. R.C.M. 703.</p> <p>Process to compel witnesses in court-martial cases is to be similar to the process used in federal courts. Art. 46, UCMJ, 10 U.S.C. § 846.</p> | <p>The accused may obtain witnesses and documents “to the extent necessary and reasonably available as determined by the Presiding Officer.” § 5(H).</p> <p>The Commission has the power to summon witnesses as requested by the defense. § 6(A)(5).</p> <p>The power to issue subpoenas is exercised by the Chief Prosecutor; the Chief Defense Counsel has no such authority. M.C.I. Nos. 3-4.</p> | <p>Defense counsel is to be afforded a reasonable opportunity to obtain witnesses and other evidence, including evidence in the possession of the United States, according to DOD regulations. The military commission is authorized to compel witnesses under U.S. jurisdiction to appear. The military judge may authorize discovery in accordance with rules prescribed by the Secretary of Defense to redact classified information or to provide an unclassified summary or statement describing the evidence. The trial counsel is obligated to disclose exculpatory evidence of which he is aware to the defense, but such information, if classified, is available to the accused only in a redacted or summary form, and only if making the information available is possible without compromising intelligence sources, methods, or activities, or other national security interests. 10 U.S.C. § 949j.</p> |
| Right to Trial by Impartial Judge | <p>A qualified military judge is detailed to preside over the court-martial. The convening authority may not prepare or review any report concerning the performance or effectiveness of the military judge. Art. 26, UCMJ, 10 U.S.C. § 826.</p> <p>Article 37, UCMJ, prohibits unlawful influence of courts-martial through admonishment, censure, or reprimand of its members by the convening authority or commanding officer, or any unlawful attempt</p> | <p>The Presiding Officer is appointed directly by the Appointing Authority, which decides all interlocutory issues. There do not appear to be any special procedural safeguards to ensure impartiality, but challenges for cause have been permitted. § 4(A)(4).</p> <p>The presiding judge, who decides issues of admissibility of evidence, does not vote as part of the commission on the finding of guilt or innocence.</p> | <p>Military judges must take an oath to perform their duties faithfully. 10 U.S.C. § 949g.</p> <p>The convening authority is prohibited from preparing or reviewing any report concerning the effectiveness, fitness, or efficiency of a military judge. 10 U.S.C. § 948j(a).</p> <p>A military judge may not be assigned to a case in which he is the accuser, an investigator, a witness, or a counsel. 10 U.S.C. § 948j(c).</p> |

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| | <p>by a person subject to the UCMJ to coerce or influence the action of a court-martial or convening authority.</p> <p>Art. 37, UCMJ, 10 U.S.C. § 837.</p> | <p>Article 37, UCMJ, provides that no person subject to the UCMJ “may attempt to coerce or, by any unauthorized means, influence the action of a court-martial <i>or any other military tribunal</i> or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.”</p> <p>10 U.S.C. § 837.</p> <p>M.C.I. No. 9 clarifies that Art. 37 applies with respect to members of the review panel.</p> <p>M.C.I No. 9 § 4(F).</p> | <p>The military judge may not consult with the members of the commission except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the commission.</p> <p>10 U.S.C. § 948j(d).</p> <p>Convening authority may not censure, reprimand, or admonish the military judge.</p> <p>No person may attempt to coerce or use unauthorized means to influence the action of a commission.</p> <p>10 U.S.C. § 949b.</p> <p>The military judge may be challenged for cause. 10 U.S.C. § 949f.</p> |
| Right to Trial By Impartial Jury | <p>A military accused has no Sixth Amendment right to a trial by petit jury.</p> <p><i>Ex Parte Quirin</i>, 317 U.S. 1, 39-40 (1942) (<i>dicta</i>).</p> <p>However, “Congress has provided for trial by members at a court-martial.”</p> <p>United States v. Witham, 47 MJ 297, 301 (1997); Art. 25, UCMJ, 10 U.S.C. § 825.</p> <p>The Sixth Amendment requirement that the jury be impartial applies to court-martial members and covers not only the selection of individual jurors, but also their conduct during the trial proceedings and the subsequent</p> | <p>The commission members are appointed directly by the Appointing Authority. While the Commission is bound to proceed impartially, there do not appear to be any special procedural safeguards designed to ensure their impartiality. However, defendants have successfully challenged members for cause. § 6(B).</p> | <p>Military commission members must take an oath to perform their duties faithfully. 10 U.S.C. § 949g.</p> <p>The accused may make one peremptory challenge, and may challenge other members for cause. 10 U.S.C. § 949f.</p> <p>No convening authority may censure, reprimand, or admonish the commission or any member with respect to the findings or sentence or the exercise of any other functions in the conduct of the proceedings.</p> |

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| | <p>deliberations.</p> <p>United States v. Lambert, 55 M.J. 293 (2001). The absence of a right to trial by jury precludes criminal trial of civilians by court-martial.</p> <p>Reid v. Covert, 354 U.S. 1 (1957); Kinsella v. United States <i>ex rel.</i> Singleton, 361 U.S. 234 (1960).</p> | | <p>No person may attempt to coerce or, by any unauthorized means, influence the action of a commission or any member thereof, in reaching the findings or sentence in any case.</p> <p>Military commission duties may not be considered in the preparation of an effectiveness reports or any similar document with potential impact on career-advancement.</p> <p>10 U.S.C. § 949b.</p> |
| Right to Appeal to Independent Reviewing Authority | <p>Those convicted by court-martial have an automatic appeal to their respective service courts of appeal, depending on the severity of the punishment.</p> <p>Art. 66, UCMJ; 10 U.S.C. § 866.</p> <p>Decisions by service appellate courts are reviewable on a discretionary basis by the Court of Appeals for the Armed Forces (CAAF), a civilian court composed of five civilian judges appointed by the President.</p> <p>Art. 67, UCMJ; 10 U.S.C. § 867.</p> <p>CAAF decisions are subject to Supreme Court review by writ of certiorari.</p> <p>28 U.S.C. § 1259.</p> <p>The writ of <i>habeas corpus</i> provides the primary means by which those sentenced by military court, having exhausted military appeals, can challenge a conviction or sentence in a civilian court. The scope of matters that a court will address is narrower</p> | <p>A review panel appointed by the Secretary of Defense reviews the record of the trial in a closed conference, disregarding any procedural variances that would not materially affect the outcome of the trial, and recommends its disposition to the Secretary of Defense. Although the Defense Counsel has the duty of representing the interests of the accused during any review process, the review panel need not consider written submissions from the defense, nor does there appear to be an opportunity to rebut the submissions of the prosecution. If the majority of the review panel forms a “definite and firm conviction that a material error of law occurred,” it may return the case to the Appointing Authority for further proceedings.</p> <p>§ 6(H)(4).</p> <p>The review panel recommendation does not appear to be binding. The Secretary of</p> | <p>The accused may submit matters for consideration by the convening authority with respect to the authenticated findings or sentence of the military commission. The convening authority must review timely submissions prior to taking action.</p> <p>10 U.S.C. § 950b.</p> <p>The accused may appeal a final decision of the military commission with respect to issues of law to the Court of Military Commission Review, a new body comprised of appellate military judges who meet the same qualifications as military judges or comparable qualifications for civilian judges.</p> <p>10 U.S.C. § 950f.</p> <p>Once these appeals are exhausted, the accused may appeal the final decision to the United States Court of Appeals for the District of Columbia Circuit. Appellate court decisions</p> |

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| | <p>than in challenges of federal or state convictions.</p> <p>Burns v. Wilson, 346 U.S. 137 (1953).</p> | <p>Defense may serve as Appointing Authority and as the final reviewing authority, as designated by the President.</p> <p>Although the M.O specifies that the individual is not privileged to seek any remedy in any U.S. court or state court, the court of any foreign nation, or any international tribunal, M.O. § 7(b), Congress established jurisdiction in the Court of Appeals for the D.C. Circuit to hear challenges to final decisions of military commissions. Detainee Treatment Act of 2005.</p> | <p>may be reviewed by the Supreme Court under writ of certiorari.</p> <p>10 U.S.C. § 950g.</p> |
| Protection against Excessive Penalties | <p>The right to appeal a conviction resulting in a death sentence may not be waived.</p> <p>R.C.M. 1110.</p> <p>Death may only be adjudged for certain crimes where the defendant is found guilty by unanimous vote of court-martial members present at the time of the vote. Prior to arraignment, the trial counsel must give the defense written notice of aggravating factors the prosecution intends to prove.</p> <p>R.C.M. 1004.</p> <p>A conviction of spying during time of war under article 106, UCMJ, carries a mandatory death penalty.</p> <p>10 U.S.C. § 906.</p> | <p>The accused is permitted to make a statement during sentencing procedures. § 5(M).</p> <p>The death sentence may be imposed only on the unanimous vote of a seven-member panel. § 6(F).</p> <p>The commission may only impose a sentence that is appropriate to the offense for which there was a finding of guilty, including death, imprisonment, fine or restitution, or “other such lawful punishment or condition of punishment as the commission shall determine to be proper.” § 6(G).</p> <p>If the Secretary of Defense has the authority to conduct the final review of a conviction and sentence, he may mitigate, commute, defer, or suspend, but not increase, the sentence.</p> | <p>Military commissions may adjudge “any punishment not forbidden by [the MCA] or the law of war, including the penalty of death....” 10 U.S.C. § 948d.</p> <p>A vote two-thirds of the members present is required for sentences of up to 10 years. Longer sentences require the concurrence of three-fourths of the members present. The death penalty must be approved unanimously on a unanimous guilty verdict. Where the death penalty is sought, a panel of 12 members is required (unless not “reasonably available”). The death penalty must be expressly authorized for the offense, and the charges must have expressly sought the penalty of death. 10 U.S.C. § 949m.</p> |

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| | <p>However, he may disapprove the findings and return them for further action by the military commission. § 6(H).</p> | <p>An accused who is sentenced to death may waive his appeal, but may not withdraw an appeal. 10 U.S.C. § 950c.</p> <p>The death sentence may not be executed until the commission proceedings have been finally adjudged lawful and the time for filing a writ has expired or the writ has been denied; and the President approves the sentence. 10 U.S.C. § 950i.</p> |